No. 2278

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

JIM HONG,

Appellee.

In the Matter of the Application of JIM HONG for a Writ of Habeas Corpus.

Supplemental
Transcript of Record
Filed by and on Behalf of Appellee.

Upon Appeal from the United States District Court for the District of Arizona.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the District Court of the United States for the District of Arizona.

In the Matter of the Application of JIM HONG for a Writ of Habeas Corpus.

Supplemental Transcript of Record.

Hearing had before Hon. RICHARD E. SLOAN, Judge of the District Court of the United States, for the District of Arizona, on the 3d day of March, 1913.

Names and Addresses of Counsel.

Appearances:

For Jim Hong: Hon. EDWARD KENT, WILLIAM M. SEABURY, Esq.,
Fleming Building, Phoenix, Arizona.

For the United States: O. T. RICHEY, Esq., Assistant United States Attorney,
Phoenix, Arizona.

Stenographic Report of Proceedings made by RAYMOND ALLEE.

[Report of Proceedings Had March 3, 1913.]

[1*] The COURT.— Have you seen the return?

Mr. SEABURY.—I have seen a copy of it, if your Honor please. I don't think my copy is complete.

Mr. RICHEY.—(Hands return to counsel.)

Mr. SEABURY.—I have seen the return, if your Honor please; we desire to traverse the return and file herewith with the Clerk the traverse of the petitioner. We may state, if your Honor please, that the subject of the traverse is that the petitioner denies the allegations of the marshal to the effect

*Page-number appearing at top of page of original certified Record.

that, at the time of the granting of the writ, he was not in the actual custody of the marshal; and we say that, at the time of the application for the writ, the prisoner had been surrendered formally to the deputy marshal, Mr. Anderson, and had been expressly placed in his custody by his bail and with the statement that his bail would be no longer responsible for him; and, thereupon, application was made to your Honor for a writ of *habeas corpus* returnable this morning, and after the writ was granted and pending determination of the petition, a bail bond was furnished that he would be produced here this morning. We are here pursuant to that bond, and we have again surrendered him to the marshal [2] and now contend that he is in the custody of the marshal. The learned Commissioner, before whom this proceeding was pending, has directed my attention to the fact that the more regular practice would have been to have made the appearance before the Commissioner and made the surrender before him under the bond which was given before the Commissioner. The bondsmen agreed to produce the prisoner before the Commissioner this afternoon at 2 o'clock, and our position with reference to that is that one of two things will take place at 2 o'clock: If the prisoner is released from the custody in which he is now held, under and by virtue of the terms of the writ granted by this Court, he will be produced for the purpose of discharging his bond; and, if he is not in such a position, he is necessarily in the custody of this Court, and that will be a complete and absolute discharge so far as the Commissioner is con-

cerned; and, for that reason, we ask that we be permitted to proceed with the examination before this Court.

Mr. RICHEY.—The marshal in his reply—his return, if the Court please, made the return upon the basis of the law governing the surrender of bail so far as he was able to ascertain it to be. There being no special provision of the federal statute [3] governing the surrender of an alien who has been charged with being unlawfully within the United States, the marshal assumes that the law governing such would be the criminal law, as that part of the proceedings in the bringing of the alien before the Commissioner is criminal in its nature and is a quasi-criminal action. It is provided that the actual trial before the Commissioner shall be done in accordance with the civil rules of practice, but up to that time it appears that the criminal laws would govern his arrest, the disposition of his arrest, and his appearance before the Court to answer to the charges made, and upon the final proceedings, as to the introduction of the evidence and the disposition of the trial, it then becomes criminal again. The Commissioner, or the Court before whom the trial takes place, either discharges the defendant or he orders him deported and commits him to the custody of the United States marshal. Now, the basis upon which the marshal makes that return, in all conscious intent, not with any intent to avoid or evade, is Section 1018 of the federal statutes.

The COURT.—Of the Revised Statutes?

Mr. RICHEY.—Yes, your Honor, Section 1018,

entitled, "The Surrender of Criminals by their Bail." [4] This provides that: "Any party charged with a criminal offense and admitted to bail may, in vacation, be arrested by his bail and delivered to the marshal or his deputy, or before any judge or other officer having power to commit for such an offense, and, at the request of such bail, the judge or other officer shall recommit the party so arrested to the custody of the marshal and endorse on the recognizance, or certified copy thereof, the discharge and exoneratur of such bail, and the party so committed shall therefrom be held in custody until discharged by due course of law." Now, it is the contention of the marshal that that is the provision under which, and the only provision under which this defendant can be surrendered by his bail; and, if there is no specific provision, that is the provision which would apply. Now, if it is contended that it is of a civil nature, the laws of the State should apply, and we should have to resort to the criminal law of the State as to the surrender of bail, as we have no civil law in the State which would govern the surrender of a defendant by bail. It is contended by the marshal that, if the defendant was in the custody of the marshal at that time, he was not in custody as the result of the proceedings against him before the Commissioner [5] but he was in custody as the representative of the bail until such time as they complied in full as required by law as to the surrender; and, while the deputy in this case was not informed and while we do not feel entirely informed in the premises, at the same time we feel that, and be-

lieve that, the defendant was not in our custody in the case; that, as he was not in our custody, and it is that custody that this petition is directed against, we do not contend that he had been released from that custody, but in being released from that custody, he is remanded to his bail, the bail given before the Commissioner, and, if the bail then desire to relieve themselves, they will take him before the Commissioner and the marshal, and his deputy, will then appear and he will then, at the request of the bail, be recommitted or committed to the custody of the marshal. Now, the marshal not being aware of a great many matters connected with this matter and this action, I have been somewhat at a loss to know just what procedure might be taken, and the United States at this time asks that it be permitted to intervene and file a pleading of intervention, containing a full statement of all of the facts and all of the matters which the petition fails to state—matters in addition to [6] which the petition fails to state—the petition does not state all of the facts; it does not state all of the matters, and the United States through myself requests at this time to be permitted to file an intervening pleading setting forth all of the facts—the matters which the marshal would have no knowledge of.

The COURT.—Waiving jurisdiction of the question?

Mr. RICHEY.—No, your Honor. We will claim that this Court has only the power in these proceedings to inquire in the jurisdiction of the Commissioner before whom the complaint was filed in this

case. The Commissioner has endeavored to make a plain statement of fact—a plain statement of the contention of the Government in regard to this defendant—claiming all the time that this court may inquire—

The COURT.—If, at the time of the issuance of the writ, the prisoner was not in custody, I presume that is jurisdictional—that is a matter to be determined.

Mr. RICHEY.—Yes, your Honor.

The COURT.—And if it could be determined that he was in custody, if the writ was properly issued, the question is upon the sufficiency of the return—[7] the marshal may be permitted to amend the return.

Mr. RICHEY.—If the Court will determine that he was in custody—

The COURT.—I see no reason for intervention by the Government. The Government is here; the marshal makes the return and that raises the question that the Government has the right to appear without filing a plea of intervention.

Mr. RICHEY.—I had formulated a statement of the facts of the case, and did not know how else it could be filed.

The COURT.—I don't think that is necessary. The Government is a party in that sense.

[Proceedings Had Concerning Statement of Facts, etc.]

Mr. RICHIE.—May I, then, proceed to make a statement of all of the facts in the matter?

Mr. SEABURY.—We object to the statement, in

the first place, because your Honor suggested the preliminary question should be determined first.

The COURT.—Yes.

Mr. SEABURY.—And, moreover, no such statement is contained in the return and we are bound by the papers filed in the court and the Government is concluded by that record. May I be sworn, if your Honor please?

(William M. Seabury was duly sworn.)

[8] Mr. RICHEY.—We may be able to eliminate any testimony or anything of that kind by the admission of certain facts. My understanding is, and we will not contend but what one of the bail, Bishop Atwood, brought up this defendant before the United States Marshal Bush Anderson, and attempted—I use the word "attempted" because I do not think it was in fact—and attempted to deliver this prisoner into the hands of the United States Marshal as the result of the pleading before Commissioner Johnstone, and Mr. Anderson, believing that that was proper, accepted him in the belief that it was proper and held him long enough for the petition to be filed here and the writ to be served on him; then the defendant was brought into Court, as I am informed, and delivered on bail by the same bail that delivered him to Mr. Anderson.

The COURT.—The question, then is whether as a matter of law, the marshal obtained custody of the defendant applicant for the writ.

Mr. RICHEY.—In a way—whether there was a custody in the Commissioner in the proceedings be-

fore the Commissioner or whether there was a custody without any authority of law—we would like to know what the contention is—whether it is a contention [9] without any authority of law or whether it is a contention that he was taken into custody as a part of the proceedings before the Commissioner. We are unable to determine from the petition just what is the claim.

Mr. SEABURY.—If your Honor please, I would like to make an offer of proof of what we are prepared to prove by witnesses, by whom we are prepared to prove it if Mr. Richey on behalf of the Government will not concede that the witnesses, if so called, would so testify.

Mr. RICHEY.—That is all right.

The COURT.—Very well.

Mr. SEABURY.—The petitioner for the writ of *habeas corpus,* who is now the defendant in this proceeding, the writ having been issued, offers to prove by the testimony of the Right Reverend Julius Atwood, Bishop of Arizona, and by the testimony of William M. Seabury, one of his counsel, that on February 27th, 1913, Bishop Atwood, as one of the bondsmen in whose custody the defendant was then held, and his said counsel then appeared at the office of the United States marshal in the Federal Building in the City of Phoenix, Arizona, and stated to the deputy marshal Mr. Bush Anderson, that they then and there surrendered [10] to him, as United States marshal, the custody of Jim Hong, the defendant above named; that counsel stated to the marshal at that time that the bondsmen of the prisoner would

no longer be responsible for his custody, and that the prisoner was left entirely under the control of the marshal; that thereafter, and while the prisoner was in the custody and under the control exclusively of Mr. Anderson, as such deputy marshal, the defendant's counsel appeared before the United States District Judge and presented a petition for a writ of *habeas corpus,* which petition was allowed and the writ issued, returnable on March third, 1913; and thereupon, and after the writ had been issued by the Court, the counsel for the defendant applied to the Court for bail, and the Court directed that the prisoner be enlarged and admitted to bail pending the determination of the proceedings on the writ of *habeas corpus.* Thereafter a bail bond was duly executed before the Clerk of the court by the same sureties who had formerly been upon the bond of the defendant, under the conditions of which bond the sureties were required to produce the defendant before the District Court of the United States at the opening thereof on March third, 1913, and to abide the further orders of the [11] District Court; and, further, upon the morning of March third, 1913, at the opening of court on that day, the same defendant was produced before the Court and was again tendered to the United States marshal together with the statement that he was then and there in the custody of the marshal and no longer in the custody of the bail, and that such tender was made by the same bondsmen; and that, thereupon, while in such custody, the traverse of the marshal's return was duly verified and thereafter filed; and that is what

we desire to prove by oral testimony unless Mr. Richey will concede that the statements of fact are true.

Mr. RICHEY.—We will admit that.

Mr. SEABURY.—With the reservation to the Government's attorney to the effect that he does not concede what the legal effect of such acts may be.

Mr. RICHEY.—Except the Government will claim that the legal effect of the attempted delivery to the United States marshal only made the United States marshal an agent of the bail.

The COURT.—You admit the facts—the truth of what they propose to show?

Mr. RICHEY.—Yes, your Honor; except that the marshal upon the attempted delivery of the prisoner [12] in his custody at the opening of court of March third, 1913, refused to take custody except that the defendant be brought before the Court, and the bail there exonerated and the prisoner delivered to the marshal as the result at that time.

Mr. KENT.—That is not exactly so. The bail in my presence surrendered the defendant to the marshal this morning, the marshal accepted him and then came into court, and the United States attorney advised him—advised him what, I don't know.

Mr. RICHEY.—As soon as the marshal consulted me, he rescinded the act and attempted to turn him back for he had no right to accept him.

Mr. SEABURY.—But, however, counsel for the petitioner declined to accept him, and stated to the marshal that, irrespective of anything the marshal might say, counsel respectfully contended that the

prisoner was in his custody and he alone would be responsible for him. Will your Honor hear any argument on the question?

The COURT.—Yes; what have you to produce in behalf of this matter—any authorities here?

Mr. RICHEY.—In reference to the surrender?

The COURT.—Yes.

Mr. RICHEY.—No; merely the provision of the [13] statutes. I know of nothing else—have been unable to find anything else.

[Argument, etc.]

Mr. SEABURY.—Now, if your Honor please, we claim that Section 1018 of the United States Revised Statutes is merely directory in its character, and that, by no possibility could Congress have intended to at all have deprived bail of the right to surrender the prisoner at any time in their own exoneration. It is fundamental that when a bondsman executes a bond and takes into his possession and custody a prisoner returnable before a court on a certain day, that he has the inevitable right to relieve himself of that responsibility by returning the prisoner to the custody from which he came. Now, the custody from which the prisoner was relieved at that time was the custody of the United States marshal, and that custody existed under and by virtue of the original warrant which was issued by the Commissioner for the arrest and detention of the prisoner awaiting deportation. It seems to me that the conclusive answer to the contention of the Government, if your Honor please, is this aspect of the situation: we are here in court with the prisoner, disclaiming the right to

control his actions; we are here in response to the orders of this Court, in obeyance to the Court [14] and to await the further orders of the Court, with which we are prepared to comply. The prisoner is not in our custody; he is here in court in the custody of the marshal. Now, if Mr. Richey's contentions be correct, that most and greatest extent to which it can go is that at 2 o'clock this afternoon the bail who went on the bond before the Commissioner may possibly be held to be liable on that bond—which is a matter which does not concern this Court in the slightest respect. This Court is prepared to deal only with the present custody of the prisoner and with the pleadings before it. If, as I have stated, in securing the prisoner before this Court, the bondsmen or their counsel have done anything which will subject the bondsmen to a pecuniary liability on the bond which they gave before the Commissioner, that is a matter with which this Court has no concern, and in which, I take it, it has no interest. When 2 o'clock this afternoon comes, we will appear before the Commissioner in order to show that there has been no disregard for the Commissioner's alleged jurisdiction; we will show the Court that the prisoner has been discharged from his custody this morning in this proceeding or else he is still held under the process of this Court, which will supersede the process [15] of that Court. His jurisdiction certainly cannot be more extensive than the jurisdiction of this Court, and I think it is quite clear that whatever—

The COURT.—The only question is whether the

surrender to the marshal, unaccompanied by the other formalities mentioned in Section 1018, was effectual in the surrender of the applicant here to the marshal so that he was in the actual custody of the marshal at the time the writ issued. I take it that this is jurisdictional. The writ cannot issue until and unless there be a real intention.

Mr. SEABURY.—If your Honor will hear me for a moment upon another point, there is another aspect I would like to contend for. We respectfully contend that Section 1018 of the United States Revised Statutes is wholly inapplicable to the present case—it has no application whatever to this situation, for the reason that that section relates only to a person charged with a criminal offense. I have an authority here in the form of an opinion rendered in the Ninth Circuit Court of Appeals which holds flatly that the proceeding is of a civil nature; that there is no affirmative statute in the United States authorizing the admission to bail in such cases, and that the admission to bail rests entirely with the [16] discretion of the Court; so that it seems clear to me that the section is wholly inapplicable to the present proceeding.

The COURT.—Is there any statute that is applicable?

Mr. SEABURY.—No, your Honor; but the implication contained in the Chinese exclusion acts is to the effect that the Court has the right to admit to bail. Now, the case I was looking for is contained in 187 Federal. Now, the case came before Judge Gilbert, as I recall the facts, upon an application

for bail after there had been an order of deportation granted by the commissioner, and the application was upon *habeas corpus,* and the Court said that it had the right to admit to bail. (Cases cited from 187 Federal and 132 Federal.) In this case, the lower Court declined to admit to bail; in consequence of which the ruling of the trial court was affirmed, and the ruling was in line with all of the recent authorities, and was to the effect that the admission to bail was in the Court's discretion; and that was based entirely upon the reasoning that proceedings under the exclusion act were not of a criminal character, and, under our statutes, Section 1018 necessarily has nothing to do with the proceeding. [17] We claim that we had a right to surrender to the marshal this prisoner, and it was the duty of the marshal to take him into possession, and he was solely responsible for his custody and production before any Court.

Mr. KENT.—When, your Honor, I was on the bench, the question was before the Supreme Court of the Territory, the rights to admit to bail, and the Supreme Court held in that case that it was a discretionary right. Following the decisions cited by Mr. Seabury, it resolves itself into this: This, being not a criminal case, the criminal statutes of the United States do not apply, but the bail may surrender the person in their custody just as they may in any civil case just by taking him to the officer. A man under arrest in a civil process may be surrendered to the sheriff without application to any Court when the bail have reason to believe that he

may no longer remain in their custody. Therefore, in this instance, we had the absolute right and the bail had the right to surrender this man to the marshal for whatever reasons they may have had. Mr. Seabury suggested a case—in the case of Jim Hong, 187 Federal, decided in the Circuit Court of Appeals, Ninth Circuit—which is direct in point. The [18] general provisions in regard to bail in criminal cases do not apply, as deportation cases are not criminal in their character. (Cases cited in 149 and 163 Federal.)

Mr. RICHEY.—There is no contention, your Honor, that the bail have not the right to surrender their charge at any time, but it is contended that, if they do surrender him, they must surrender him by a rule which is reasonably applicable. Now, it is contended by the counsel that there is no specific provision in regard to these matters and it is discretionary with the Court. If that is a fact, and the Court does assume the right and the power, it should be governed by the laws which would, under the specific provisions, govern in the matter of bail. Now, the Court has evidently stated that the rules in criminal cases shall not apply, but I think the Court intended that that ruling should apply as a matter of right or a matter of course, but the Chinese cases are quasi-criminal cases; they are tried according to rules of civil procedure, but the whole action against Chinese persons charged with being unlawfully within the United States is criminal in its nature; he is arrested, taken into custody, and permitted to go upon bail for his appearance; it is [19]

criminal in its nature; it is criminal to a certain extent, and that part of the proceeding and the rules governing and fully governing a like procedure are naturally and reasonably those rules governing like procedure in specific criminal matters; it would be reasonable and proper to apply those rules in the disposition of bail matters in alien cases—in Chinese exclusion cases. The complaint is laid, the warrant of arrest is issued, the defendant is arrested, taken before the Commissioner, his trial set and he is ordered admitted to bail, the bail is furnished, and he is enlarged on it; and the whole matter is criminal in its nature, criminal in its procedure; and the counsel states that he was delivered to the custody from whence he was taken upon bail. Now, that is not a fact. He was arrested and taken and delivered into court and was never delivered into the hands of the United States marshal. He was in the possession of the Court and not in the custody of the marshal until he was remanded and ordered into his custody; and in this instance, the warrant was returned and he was delivered into the custody of the Commissioner; and, as an officer of that court, of course, the marshal stood there, and, without ever being committed to the custody of the United [20] States marshal, he was enlarged upon bail, and the Court was the custodian at the time he was enlarged upon bail and not the United States marshal.

The COURT.—No; I should not think that the Court was the custodian. It might be that the order of the Court was necessary in order to vest the right of the detention in the marshal, but in a crim-

inal case the Court is never the custodian. The custody is used in that narrower sense that the actual detention, physical detention, which is the basis for the writ of *habeas corpus*—that is to say, that no writ of *habeas corpus* would lie against the Court; and I should say that I know of no instance where the Court is deemed the custodian of a defendant in a sense that a writ would lie against it.

Mr. RICHEY.—It is well established, and has been stated by Courts without end, that Chinese exclusion cases are quasi-criminal cases and are conducted according to the rules of civil trials, but that they are not entirely civil proceedings, that they are not governed entirely by the rules of civil procedure—it is merely a disposal of the right that is disposed of by the civil procedure.

The COURT.—What is the procedure at common law for the surrender of bail?

[21] Mr. RICHEY.—I am not prepared to state, and where there is a statute and a rule and no provision made, I would think that the Court would be governed by whatever statute there was.

The COURT.—Yes; it applies. I should say that this applies only by analogy.

Mr. RICHEY.—Yes; that is how I take it. That is the most reasonably applicable provision that we have governing such a provision, and having that, and that being our law, and we being used to that procedure, it seems to me that that would be what would be required.

Mr. KENT.—The difficulty is that the United States Circuit Court for this circuit does not agree

with Mr. Richey. The general statutory provision in regard to bail for a criminal case does not apply to deportation cases—they are not criminal in their nature. Your Honor would have to hold here that, in a case which is not criminal, that is where the criminal statutes do not apply, in order to surrender the person in their custody, that they have to follow the provision of a criminal statute; and there is no warrant for saying that they must go before the Court to surrender pursuant to provisions of this statute unless it is a criminal case. The [22] United States Supreme Court says it is not a criminal case, and the statutory provisions in regard to bail do not apply, and you are asked in this case to say that they do apply and the surrender was not legal. Now, your Honor is well aware that the surrender of bail—

The COURT.—Is that the method at common law?

Mr. KENT.—Yes; as far as I know. Without statute, how could it be otherwise? The bail, being apprehensive that he may disappear, he goes to the officer and says that he will no longer be responsible and to take him back. The officer then becomes the custodian. (Cases cited from 187 Federal and 190 Federal.)

The COURT.—I think under that decision it is a common-law procedure—it is a common-law right.

Mr. KENT.—Therefore, this procedure does apply.

The COURT.—But I am curious to know what the procedure at common law was.

Mr. KENT.—I don't know, your Honor; except

we know it is a matter of practice to surrender to the sheriff.

The COURT.—I am sure the Court does not know.

Mr. KENT.—I know the statute does not apply.

[23] Mr. RICHEY.—I disagree with the Court as to the matter of practice of delivering to the marshal.

The COURT.—Common law?

Mr. RICHEY.—Under State or federal, it requires a certain procedure.

The COURT.—That is a matter usually determined by the statute.

Mr. RICHEY.—Yes, sir.

The COURT.—But this is not a statutory bail.

Mr. RICHEY.—No; I am simply making my contention that that would be the practice.

The COURT.—Not necessarily so; if the statute does not apply, that might be governed properly by a ruling of the Court following the analogy of the criminal practice, as provided by statute, but in the absence of any ruling of Court, I am somewhat in doubt as to what should be—

Mr. KENT.—May I suggest, your Honor, that the contention of the United States Attorney that the statute does apply and that bail had not been surrendered on account of this statute—

Mr. RICHEY.—I think Judge Kent misunderstands me. My contention is that it should be made applicable because of its uses in our practice, it being our only statute governing the question of bail.

[24] The COURT.—That is a matter of discre-

tion—this matter should arise properly when the writ issues. After the writ issues, the Court could hardly dismiss it because a better practice could be resorted to. It is a matter to be governed entirely by a ruling of Court, and I am inclined to think that there is jurisdiction here, and we may proceed on that theory, and you may amend your return by two o'clock if you wish.

Mr. RICHEY.—Yes, your Honor.

The COURT.—Adjourned until two o'clock.

Mr. SEABURY.—May I ask what disposition may be made of the prisoner in the meantime?

Mr. RICHEY.—The marshal refuses to take the custody of him without your Honor's orders.

The COURT.—The marshal may take the custody of the prisoner and bring him back this afternoon.

[Exception.]

Mr. RICHEY.—Before filing the return, we desire to except to the ruling.

[Proceedings Had After Amendment of Return to Writ, etc.]

Mr. SEABURY.—If your Honor please, in response to the amended return to the writ, we desire to file with the Clerk the demurrer of the defendant to the return, which is as follows:

(The demurrer to the amended return to the writ **[25]** is read by Mr. Seabury.)

[Motion for Judgment Discharging Defendant from Custody, etc.]

Mr. SEABURY.—In addition to that, if your Honor please, I desire to move at this time for judg-

ment discharging the defendant from custody upon the pleadings before the Court, and, as to that, I would like to be heard. We have here, if your Honor please, a petition which has not been fully read in the proceedings. There is considerable detail stated in the petition. It is not the usual petition which simply says that a man is restrained of his liberty by certain process, but it has gone into the matter very fully. It states certain facts. It is the purpose of the writ to show by what process this defendant is held, from which the Court will be obliged to determine whether or not it is due process and whether or not he be properly held at the time of the issuance of the writ. This return does nothing more than state the facts which were admitted in court this morning, which deal with the Court's jurisdiction at this time.

Mr. RICHEY.—This is just the reason why the United States desired to intervene and state their cause and join issues with the petition.

Mr. SEABURY.—The United States is before the Court now in the person of the marshal, and his [26] attorney is the United States Attorney for the District.

The COURT.—I don't know of any intervention in *habeas corpus* cases.

Mr. RICHEY.—I know of none, but I know of no reason why the Government should not answer the petition through the United States Attorney.

The COURT.—It usually does through the marshal.

Mr. RICHEY.—The marshal may know nothing of these facts.

The COURT.—The return of the marshal will show by what authority he holds him. If it be by warrant of arrest, he produces his warrant of arrest and order of detention, and he presents his order of detention.

[Motion for Leave to Further Amend Answer, etc.]

Mr. RICHEY.—We ask at this time, if the Court please, to permit the United States marshal to further amend his answer, with the changes which will be necessary in substituting the United States marshal for the intervener, and, as soon as I can get around to it with sufficient time, I will make that amendment in this proceeding.

Mr. SEABURY.—We are, of course, surprised by the allegations of fact contained in the new petition **[27]** which we have never seen.

The COURT.—I will permit the return to be amended if the return to the writ is insufficient and if you wish to put in your amended return the facts as to his detention.

Mr. RICHEY.—I do, your Honor, and as soon as I can get the time, I will substitute the marshal for the intervener named herein.

Mr. SEABURY.—In the meantime, if your Honor please, we desire, if allegations of fact are contained in it, to be permitted to examine the new proposed pleading, if your Honor will give me a few moments to confer with Judge Kent on the subject.

Mr. KENT.—I understand the United States Attorney wants to make, as a return to the writ, that

the United States marshal makes the following return and then have the petition as it goes.

Mr. RICHEY.—Yes; except I wish to substitute the marshal for the intervener.

Mr. KENT.—We might wish to demur, and want to have it understood, and if the United States Attorney would style his caption—

Mr. RICHEY.—As a further amended return of the United States marshal.

Mr. SEABURY.—To take the place of the two [28] former returns?

Mr. RICHEY.—In addition.

The COURT.—I understand you style that as an additional return.

Mr. SEABURY.—This will be a second amended return?

Mr. RICHEY.—This will be filed with it—simply attached to it, with the Court's permission, because there is no return on this unless I make an exact copy.

The COURT.—This is an amended return?

Mr. SEABURY.—This is a separate return, as I understand it.

Mr. KENT.—Might it state that it is a part of the second amended return of C. A. Overlock, United States Marshal, to the writ of *habeas corpus* hereto annexed, and that the facts set forth in the first amended return are hereby incorporated in full?

Mr. RICHEY.—I will state that I will fix it any way that will be satisfactory to you as to the manner of identification.

Mr. SEABURY.—May we be accorded the privi-

lege of reading the proposed return so that we may determine whether we will traverse or demur?

(Intermission.)

[Motion That Demurrer to First, Stand as Demurrer to Second, Amended Return, and Motion for Judgment on Pleadings, etc.]

[29] Mr. SEABURY.—If your Honor please, we have examined, with as much care as possible during the brief interval, the second amended return of the Government in this proceeding. We move that our demurrer to the first amended return be permitted to stand and be read as a demurrer to the second amended return; and we hereby demur to this second amended return, and move again for judgment on the pleadings as they now stand, praying the discharge of the prisoner.

[Argument on Demurrer to Second Amended Return, etc.]

Now, in support of that motion, if the Court please, I would like to direct the Court's attention to a consideration of the pleadings. We have alleged in substance that the petitioner, the defendant here, is a person of Chinese descent; that he is lawfully within the United States; that he has never departed therefrom since given his certificate. He states that he has a certificate, given a certain number; the answer admits that he has a certificate described in the petition, and that the certificate is a certificate of residence—of his right to be in the United States.

Mr. KENT.—Mr. Richey, may we have the certificate a minute?

(Mr. Richey hands the certificate to Mr. Kent.)

Mr. SEABURY.—This certificate, if your Honor [30] please, so far as we have been able to gather—we have only seen it twice very hastily—is a certificate granted under the Act of 1893, which amended the Act of 1892, and is the type of a certificate, as we understand it, which is known as a "certificate of residence and identification." We claim for it a peculiarly strong position in that respect, because, under the authority, it differs from the other certificates. This is a certificate which was granted after a complete investigation by the officers granting it, and is conclusive in its character. Now, there are no substantial allegations in this return, if your Honor please—there are only conclusions that he is not a person lawfully within the United States. It admits the granting of the certificate. It does not set up any of the facts at all, but is again an attack upon the jurisdiction of this Court—a renewal of the claim of this morning that this Court has no jurisdiction to entertain this *habeas corpus* because of the pendency of the proceedings before Commissioner Johnstone. It attempts to demur to the petition, and says that, even if everything in the petition were true, he would not be entitled lawfully to be and remain in the United States. We are in this country under and by virtue of that [31] certificate, and under the authorities that certificate is conclusive evidence of our right to remain. Now, the office of this writ, as we have said this morning, is to show the cause of detention. We attached copies of the warrant and complaint to our petition, all of which

is admitted to be correct in this return. Now, the warrant was this:

[Warrant.]

"Complaint on oath having been this day made before me, a United States Commissioner for the District of the State of Arizona, that the offense of being a Chinese person unlawfully within the United States has been committed and accusing Jim Hong thereof:

"You are, therefore, commanded by the President of the United States forthwith to arrest the above-named Jim Hong and bring him before me forthwith at my office, in the District of Arizona, or in case of my absence, or inability to act, before the nearest and most accessible Commissioner within this District."

Now, the complaint, which was the basis for that warrant, was this:

[Complaint.]

"O. T. Richey, being duly sworn, on behalf of the United States deposes and says that he is a duly appointed, qualified and acting [32] Assistant United States Attorney, that Jim Hong is a Chinese person not lawfully entitled to be or to remain in the United States, and that the said Jim Hong is now in the District of Arizona, and within the County of Maricopa thereof; wherefore affiant prays that a warrant be issued for the arrest of the said Jim Hong that he may be dealt with in accordance with law."

This leaves the accused to ascertain as best he may when he is confronted for the first time by a witness

who accused him of being illegally here, of what the illegality consists; whether he fraudulently secured the certificate in the first instance; whether it was induced to be issued to him by a fraudulent misrepresentation; or whether he had departed from the United States in violation of certain provisions of the statutes; or whether he remained absent; or whatever he may have done; or whether he may have committed a crime. We are left in ignorance in regard to it, and we stand upon the admission contained in the answer that it is true that we had this certificate; the officers of the Government took it from us—seized it from the accused; and their assertion of a right to hold that certification, in violation of the rights of the accused, shows clearly [33] an admission that we at least obtained the certificate properly; and they set up no facts which show or tend to show any facts from which it can be inferred that we have surrendered that right; and, on the pleadings for that reason, we move for judgment dismissing and discharging the petitioner. Before your Honor rules upon it, we would like to direct your Honor's attention to 176 Federal, which was decided in March, 1910, in the Circuit Court of Appeals in the Fifth Circuit. (Case cited from 176 Federal.) In that respect, it is identical with this case here. Now, we have a return which sets up that he was arrested; that they had a right to arrest him; that they had a proceeding pending before Commissioner Johnstone for his removal. In that proceeding we would have a right to address the Court and determine, asserting no facts at all, what

we have done which constitutes an illegal presence in the United States. The Circuit Court examined the matter and found insufficiency of the return to justify the detention of the prisoner and discharged him. That authority, if your Honor please, does nothing more than exemplify the perfectly well settled rules applicable to *habeas corpus* cases. The petition for the writ should contain a plain [34] statement of the facts; it should set out what the cause of detention is in this case, the order of arrest and complaint. The return, on the other hand, should come in and disclose the cause of detention; it should produce the process under which the man is held in order that the Court before whom the writ is heard can determine the lawfulness or legality of his detention. If the return shows such facts, the petitioner has one of two remedies left. If the Court determines such facts or course of procedure, he may either demur to the return on the ground that the facts stated do not constitute a ground for the detention of the defendant; or, if there be questions of fact raised, it is his privilege to traverse; but, in the absence of traversing of allegations of fact, the statements given in the return are to be found in favor of the Government and against the petitioner. That is the purpose of the traverse: to put those in issue, and leave them before the Court where the allegations of the petitions may be believed to be true. Now, as I have said, there are only conclusions of law in the return. We are not required to traverse, as a fact, conclusions of law; and conclusions of law, even in themselves, are wholly

insufficient to justify any detention [35] of this man. In the face of the allegations contained in the petition, and from the affirmative showing which is made here by the production of the certificate, it is complete identification. By its admission to be the certificate, as stated in the petition, and also under the return, and under the authorities, we ask for the discharge of the prisoner, under the pleadings. We are here now upon a second amended return. We think that every opportunity has been accorded to the Government to show the cause of detention if it was other than we allege it to be, which it is not, and we respectfully contend that upon the process stated by us, and admitted to be the process under which he is held, is not sufficient ground for his detention, and we, therefore, ask for his discharge.

Mr. KENT.—I want to supplement. What is the truth here, if your Honor please? We have set up in our petition that this man is lawfully here under a certificate of residence, and that he has been arrested and is in the custody of the marshal and deliberately restrained of his liberty, and by writ of *habeas corpus* ask for his discharge; they set up and say that he has a certificate, thereby admitting that he was here lawfully. They then put in an [36] allegation of law and say that he was here unlawfully; that there was another proceeding pending before the Commission to deport him. Now, the return to the writ of *habeas corpus* must show the ground of detention—not to say that he is here unlawfully—particularly when they admit in their return that he

has a certificate to show his right to be here. Unless they come in and show something which shows a showing which contravenes the law, under that certificate there is nothing to try. Suppose your Honor should deny this motion, should overrule the demurrer, what do we try. There is no issue whatever raised by the return; they cannot come forward and produce any evidence of illegality of being here, because there is nothing to support it. We, on the contrary, have shown by our pleadings and they admit his right to remain here under that certificate. Clearly on the pleadings—clearly there is nothing your Honor can do but dismiss him.

Mr. RICHEY.—If your Honor please, the Chinese law, in Section 3, Act of May 5th, 1892, an act to prohibit the coming of Chinese persons into the United States, now in force, states that "any Chinese person or person of Chinese descent arrested under the provisions of this act," etc. The only charges [37] that the United States has to make is to charge that he is here unlawfully—and all the charge that is necessary is that he is here unlawfully—do not need to sign a complaint—take him before a Commissioner without any papers at all and state that he is here unlawfully.

The COURT.—Suppose he produces a certificate?

Mr. RICHEY.—It is up to the United States to controvert it. The United States has never been given an opportunity to controvert it. The trial has not been had.

The COURT.—This is a *habeas corpus* matter, and

it is your duty and you must show by what authority he is detained.

Mr. RICHEY.—But, if your Honor please, it should be done before the Commissioner.

The COURT.—There is nothing in that contention that the District Court of the United States cannot inquire into the question of a detention on *habeas corpus*. Then, if it does and the court has jurisdiction and the question is raised, it is for the Government to show the cause of his detention, and the cause of his detention is that he is here without a certificate or that he is a Chinese person, a laborer, here without a certificate.

[38] Mr. RICHEY.—That is our contention; and it being his duty to show by affirmative proof his right to remain here, and there being an appeal from that Court, this Court will not look into those matters.

The COURT.—This is just the purpose of the writ of *habeas corpus*. That is just the purpose of it—exactly so. The purpose is not anything more than to require the United States in this form of proceeding to show affirmatively—I take it that the very distinction between the two cases is what led to the bringing of this matter rather than by the ordinary procedure before the Commissioner to determine it. It is the right of that man to appeal to this Court, and we have no business to deny a writ of *habeas corpus* when presented. When presented it is the business of the Government to come in with its showing. It makes no difference what we think of it—of the propriety of it—it is the duty thrust

upon us, and we must comply with that duty. Now, here we are: it is a writ of *habeas corpus*, and if the Government wants to present what it has in the way of a showing why this man should be detained, it ought to be produced so that we can inquire into it. We have the jurisdiction. It is our duty to hear it. That jurisdiction being invoked, [39] we cannot evade it.

Mr. RICHEY.—Do I understand this Court that this Court can take the trial away from the Commissioner?

The COURT.—Of course it can—from the Justices of the Peace or Commissioners.

Mr. RICHEY.—And have a trial here in the first instance instead of there?

The COURT.—If it turns upon questions of fact or probable cause, the Court may take the view of it that we should, or the United States Commissioner of the Justices of the Peace, as the case may be; but, having invoked the jurisdiction of this Court, we must go ahead and try the case as we would any other *habeas corpus*. The fact that the man is a Chinaman does not make any difference.

Mr. RICHEY.—No, your Honor, that is appreciated. The contention is that the *habeas corpus* is not to fulfill the function of an appeal or writ of error; and the jurisdiction of the United States Commissioner is not affected by the positive averments in the complaint. The *habeas corpus* will not bring into review errors or irregularities, whether relative to substantive rights or law of procedure of the court with jurisdiction; and the remedy is

by appeal, [40] exception or writ of error; and we contend that, if the Commissioner has jurisdiction to try this matter, this Court will not interfere with it.

The COURT.—Suppose you have arbitrarily arrested this man and are holding him arbitrarily, this Court must inquire into that. We are not passing upon the sufficiency of your showing, but we are inquiring into the necessity of the Government of making some showing to justify the arrest and detention of this man. Otherwise, we must discharge him.

Mr. RICHEY.—The Government is willing to meet any showing of the defendant's right to be here, which he is affirmatively required to make.

The COURT.—The Court does not criticise counsel as to the position he takes—only this: there is one thing to do: either proceed as in any other case of *habeas corpus* by the presentation of proof, or any showing you may make, or to grant the writ upon the theory that the Government has failed to present anything justifying the detention of the prisoner.

Mr. RICHEY.—Does your Honor hold that, if the defendant presents his petition here, you will require the Government to introduce the same matter it would introduce before the Commissioner; that is, evidence [41] of its claim of this man's—

The COURT.—Understand, this Court knows nothing about your trial before the Commissioner.

Mr. RICHEY.—But the petitioner has stated that.

The COURT.—Possibly so; but he has not stated

anything but his right to remain in the country. There is nothing to show other than the facts set up in the petition, which would show that this Chinaman is unlawfully within the country. It is the duty of the Government to show that here in this case. If the petition shows an unlawful detention—

Mr. RICHEY.—Our contention is that the petition does not show an unlawful detention; that the petition is not full; that it does not state all of the facts; and that the return of the marshal sets out the facts that are not contained in the petition.

The COURT.—Does it show enough to show a lawful detention?

Mr. RICHEY.—It shows, under our contention, that it is a lawful detention, because that matter that the petition leaves out is the steps between the time of arrest and the right of the marshal to hold this defendant. They do not recite any bond in their petition, or any bail to connect the full chain **[42]** between the time of his arrest and the time that the bail turned him over.

The COURT.—That is raising the other question.

Mr. RICHEY.—I don't mean it that way, your Honor, but just to show that it is not a detention under the warrant but a detention under the delivery and surrender of the bail.

The COURT.—The Government may do one thing: they may stand upon the question of custody of the defendant at the time this application was made. That is all right. The Court will pass upon that. If you do not stand upon that, then, of course, you will have to stand upon the other ques-

tion as to whether the petition makes out a *prima facie* case showing unlawful detention—detention in the absence of any showing by the Government which would contravene the allegations of the petition.

Mr. RICHEY.—Well, I don't know that there will be any contravention of the allegations of fact set forth in the petition, but it will contravene the contentions of the rights of the defendant as to his being illegally restrained of his liberty. It would show that the petition—and the return made, as proposed and as will be made, will show your Honor, if you please, that this defendant was arrested last [43] November; that immediately upon his arrest he was taken before the United States Commissioner and then he pleaded not guilty; that the trial was immediately set; and that he was immediately released upon bail and was not committed to jail pending trial; that either two or three continuances were granted at the request of the defendant for this trial; and that the United States has been ready at all times to try the case. The complaint does state only in substance that the defendant is a person of Chinese descent unlawfully within the United States. Now, when he presents his certificate that he has a right to be here, that is *prima facie.* Then it is up to the Government to introduce any evidence they may have, but up to that time the Government does not disclose and is not required to disclose, and is not required to plead upon what basis it contests the defendant's right to be here.

The COURT.—Are you speaking now of the writ

of *habeas corpus* or the procedure before the Commissioner?

Mr. RICHEY.—To both, your Honor, because the writ of *habeas corpus*—.

The COURT.—I have no exception to the general rule—I know of no exception to the rule of procedure [44] in *habeas corpus* cases. The person who has the detention of the petitioner, after the petition makes out a case of unlawful detention, must come in and show the authority by which he is held.

Mr. RICHEY.—I am just endeavoring to get to that, your Honor. The petition alleges the warrant of arrest and all up to the delivery of the prisoner to the deputy United States marshal by his bail. They do not disclose that—

The COURT.—That is mere procedure. That is not the essentials of this thing. Why did he give bail in the first instance?

Mr. RICHEY.—The complaint and warrant as set forth in the petitioner's complaint—and that is what the United States bases its contention on that the Commissioner has jurisdiction, and begs to show this Court that, upon the pleadings of the petitioner himself, the Commissioner had jurisdiction—the Commissioner, having jurisdiction over the matter of the disposition of the charge, this Court will remand him to answer to that—that is the contention of the Government that the petition should be dismissed.

[Motion for Judgment Discharging Prisoner (Renewed).]

Mr. KENT.—We renew our motion, if your Honor please, that under the pleadings it is admitted that the certificate belongs to this man; the certificate [45] was duly issued to him by the Government and nothing in the return contravenes his right to be here; and, under the pleadings, we ask for judgment discharging the prisoner.

Mr. RICHEY.—We protest.

The COURT.—I have not read the return carefully. Does it state any facts?

Mr. KENT.—No, your Honor; except that it states the fact that the certificate was given to him; states facts in regard to the arrest; and also states that he has never been legally within the custody of the marshal since that time—states no facts to justify his arrest.

The COURT.—You think the mere fact that the pendency of these proceedings before the Commissioner—the fact that a complaint has been filed is not in itself a sufficient return to justify—

Mr. KENT.—This entirely supersedes that. Suppose that he has been taken off the streets—

The COURT.—You think the case is analogous to a case where a man is arrested by a warrant by a Justice of the Peace, charging him with the commission of a crime and a writ of *habeas corpus* is asked for and granted? What would the return show?

Mr. KENT.—Must show the grounds upon which he [46] is held.

The COURT.—He may justify it by showing lawful warrant of arrest issued upon a lawful complaint before a magistrate.

Mr. KENT.—But there is nothing else that your Honor can do here but grant this motion we make, or else this Court has no obligation to entertain—

The COURT.—It is a question with me whether I ought to go into the facts as to whether this procedure is not sufficient to justify the detention.

Mr. KENT.—There is nothing in the return setting up anything to inquire into.

The COURT.—The return does set forth the procedure before the United States Commissioner.

Mr. RICHEY.—Yes, your Honor.

Mr. SEABURY.—I think, if your Honor please, the difficulty with that is that the Commissioner in the first place is nothing but the officer of this court as a subordinate quasi-judicial officer.

The COURT.—I don't think that makes any difference, Mr. Seabury. The law clothes the Commissioner with certain power. It is an original jurisdiction conferred upon him, and within the scope of that authority the Commissioner is as much authorized to proceed as this Court or any other Court.

[47] Mr. SEABURY.—That is true. I did not mean to embark upon an argument to show that the Commissioner, because it was a court of inferior jurisdiction, it would not have authority; but the situation is this: they present a complaint before Commissioner which only says, as a conclusion of law, that the man is unlawfully within the United States; we apply to the Court for a writ of *habeas corpus,* which

writ is granted. As your Honor says, the Government must produce the cause of his detention; it contends that he is held by virtue of that warrant, and upon inspection of the warrant and complaint upon which it is based, it appears that he is only charged with that conclusion of law; and upon the return of the writ, we called for the production of the certificate, which was produced; and that certificate is admitted to have been taken under the admission of their return here—seized by the inspector and retained by him, who claimed authority to do so. Now, that certificate is conclusive evidence of his right to be here, and the moment that is introduced—more than that, your Honor please, this particular type of certificate is not open to collateral attack in the proceedings. Suppose that they undertake to prove that this certificate was obtained from the [48] inspector who granted it by fraud, the Courts hold flat-footed that the Commissioner has no jurisdiction over any such inquiry, and, upon proof of it, the man is entitled to his discharge. (Case cited from 149 Federal.)

The COURT.—What form of certificate?

Mr. SEABURY.—This is a certificate exactly like ours, I take it, issued under the Act of 1892, amended by the Act of 1893. In other words, that is just the point. This is not the ordinary certificate of a man's right to come into this country, and this man, as appears by the petition, was in this country for approximately twenty or thirty years, as I recall the facts. He sets up that he has been here since about sixteen years of age; and that he lawfully came through the

port of San Francisco, and stayed with his father; and his father was lawfully here under a merchant's certificate, and went back to China; and that, thereafter, he came again into the country and engaged as a merchant in some part of Texas as a member of the firm, and not engaged in manual labor or anything of the kind; and that, thereafter, he engaged in the restaurant business; [49] and that about that time, 1894, the certificate was issued to him under the Act of 1892 as amended under the Act of 1893. Now, in a case that was before the Ninth Circuit Court of Appeals, in 184 Federal, in which Judge Gilbert wrote the opinion, this comment was made: (Case cited from 184 Federal.) So that we offer these authorities, if your Honor please, with whatever qualifications are contained in other portions of them of which we are aware and of which we have no desire to deprive the Court of information concerning them. I take it that they are conclusive authority upon the question of that man's right to remain in the country in the absence of a showing by the Government in a direct attack upon it. So that, in the exercise of your Honor's discretion, you will entertain this writ, and thereupon it does not matter what happened to the bail or anything about it. Granting that the man was in the physical possession of the marshal at the time the writ was granted, and there being no response to the writ, we are clearly entitled to a discharge on the pleadings.

Mr. RICHEY.—The case there refers to a collateral attack only upon the certificate. As to its being conclusive—as to that, we admit, your Honor—we

do not contend as to that, but what it is [50] conclusive so far as its issuance and its coming from the people who first gave it, and it is exempt from collateral attack.

Mr. SEABURY.—This is a collateral attack.

Mr. RICHEY.—We do not deny that. The return of the marshal denies nearly everything set forth in the petition and pleads that it is immaterial, irrelevant and incompetent for any purpase in this *habeas corpus* proceeding.

The COURT.—What is your theory about what issue could be raised in this proceeding?

Mr. RICHEY.—I have a memorandum here with a good many authorities, and the memorandum that I have here is short. *Habeas corpus* is intended solely to free one from an illegal restraint, and it is not to fulfill the functions of an appeal or a writ of error; the jurisdiction of the United States Commissioner is not affected by defects in the positive averments in the complaint, and *habeas corpus* will not bring into review errors or irregularities whether relative to substantive rights or law of procedure. The remedy is by appeal, exception or writ of error.

The COURT.—But do you not think that the writ of *habeas corpus* may be invoked pending determination by the United States Commissioner?

[51] Mr. RICHEY.—If your Honor please, only this: to inquire whether or not the Court trying the matter has the jurisdiction to try it; if the Court has jurisdiction to try it, and jurisdiction over the subject matter, the Court appealed to for *habeas corpus* proceedings will dismiss the proceedings and

remand to the Court to be tried.

The COURT.—That is not the general rule.

Mr. RICHEY.—That is the rule except in extraordinary circumstances.

The COURT.—Every case of this kind is extraordinary in the theory of the man who brings it.

Mr. RICHEY.—Even where some right under the federal Constitution is involved; it is better to leave the prisoner to his remedy by direct proceedings. If *habeas corpus* is denied, then there is a remedy open to the petitioner other than appeal even. If it appear that jurisdiction has not been exceeded and the proceeding is regular on its face, the prisoner will be remanded.

The COURT.—Those proceedings are sound.

Mr. RICHEY.—As to aliens, it is only as to whether jurisdiction has been exceeded.

The COURT.—I presume that an examination of those cases—

[52] Mr. RICHEY.—The return challenges jurisdiction only.

The COURT.—That some order has been entered—

Mr. RICHEY.—Our contention is—

The COURT.—That is a very different case from this where there has been no adjudication at all in regard to the case.

Mr. RICHEY.—If it is shown to the Court, especially if it is shown in the petitioner's pleadings that the complaint is sufficient, as shown by the pleadings of the petitioner without evidence—if the complaint and warrant are sufficient, your Honor, my

understanding of the law is that this Court will immediately remand him to be disposed of.

The COURT.—I don't understand that to be the procedure at all, where there has been no adjudication or finding of fact by the Court.

Mr. RICHEY.—If this were a judgment, your Honor, I would then concede that the Court would have a right to go behind and make an assignment of facts.

The COURT.—That is where I differ. The Court ought to do it—but where there is no adjudication or finding—here he is a man under arrest; it does not matter whether he is a Chinaman or not. He has had no preliminary examination. Suppose he [53] sets up that his arrest was absolutely without warrant of law, without justification, no crime has been committed—may he not invoke the writ of *habeas corpus* and have the matter tried? Certainly. It is the very purpose of it.

Mr. RICHEY.—Not unless he is given an opportunity to come to trial.

The COURT.—Counsel goes too far as to that.

Mr. RICHEY.—We resist the motion.

Mr. KENT.—We ask the Court to grant the motion on the record. I don't see that the Court can do anything else but grant the motion.

The COURT.—Well, I should like to have the matter thoroughly gone into. If there is any real cause for his arrest and detention, I should like to have an opportunity to pass upon it, but I am afraid under the return that there is nothing to go into except the examination of the certificate. It seems to disclose

prima facie his right to remain. That is enough to place the burden on the United States.

Mr. RICHEY.—If the Court please—if the Court hold that with the showing here we have to produce evidence the same as we would have to introduce, it puts the matter up in the same position that if at the time of trial the prisoner should go before [54] the Commissioner and present his certificate, and we would produce our evidence if we had any. Now, if the Court is going to require—I mean if the Court is going to hold that he will discharge this prisoner on the petition if we do not controvert the claim he makes in the petition—

The COURT.—Of course, the Court does not say that—it says that I am afraid from the return as made here, there is no sufficient cause shown for his detention.

Mr. RICHEY.—I take it that your Honor rules that the complaint is insufficient.

Mr. SEABURY.—The petitioner sets it up himself.

The COURT.—Let me see the complaint.

Mr. RICHEY.—It is our contention, your Honor, that is, you discharge him on the petition, you determine that the Commissioner had not jurisdiction.

The COURT.—This complaint only states a matter of conclusion of law.

Mr. RICHEY.—Suppose we don't make a complaint—just take him before the Commissioner. That would be the same thing.

The COURT.—Yes.

Mr. RICHEY.—Then we would be compelled to [55] produce his certificate.

The COURT.—Suppose he has produced his certificate?

Mr. RICHEY.—Then the United States is compelled to produce its evidence.

The COURT.—When the certificate is exhibited, that establishes a *prima facie* right.

Mr. RICHEY.—Yes, your Honor, and I ask now whether your Honor is going to take cognizance of that certificate in this proceeding to such an extent as to compel an introduction of evidence if we desire to controvert this proceeding. If you produce this before the Commissioner, that is sufficient for the Commissioner to discharge him unless we show proper evidence to the contrary.

Mr. KENT.—This motion ought to passed upon, and Mr. Richey ought not to be talking back and forth. The pleadings are insufficient, and I ask for a discharge of the prisoner.

Mr. RICHEY.—I am endeavoring to see what position we are in.

Mr. SEABURY.—The motion—

The COURT.—It is for counsel to say. It is, of course, improper for the Court to indicate what the counsel ought to do.

[56] Mr. RICHEY.—I want to know what position the Court assumes, and then I will be able to know what we will be required to do.

The COURT.—The question before the Court, Mr. Richey, is not one of fact. It is one of law: whether the pleadings as are now presented—and by the

pleadings I mean the petition filed by the petitioner for the writ, and the returns as made by the marshal—show *prima facie* that this man is entitled to his discharge. They show that this man has a certificate, and there is no other reason given why that certificate should not be accorded the effect which certificates under the law are intended to be given. That is the right of a Chinaman to remain in this country. Whether this certificate is conclusive evidence or only *prima facie* evidence—is there any fact here set up by the marshal in his return to show that he is unlawfully within this country, notwithstanding his possession of this certificate, and I do not take it that there is.

Mr. RICHEY.—No, your Honor. We did not expect to give the names of our witnesses and what they have to testify to. It is up to the Chinaman himself to affirmatively show, as my understanding—

The COURT.—To show what?

[57] Mr. RICHEY.—To show his right—it is our contention that that matter will not be gone into if the answer meets the petition and shows the jurisdiction in the Commissioner.

The COURT.—I understand that your answer admits that he had this certificate.

Mr. RICHEY.—Yes.

The COURT.—That by your answer puts the burden on the Government.

Mr. RICHEY.—Before the Commissioner, yes; not here your Honor.

The COURT.—I don't understand that that makes any difference.

Mr. RICHEY.—It makes all the difference. If the Commissioner has jurisdiction, your Honor will not go into the facts.

The COURT.—I want to give the Government a fair opportunity to present—is it your position, Mr. Richey, that the Government is not required here to put in any proof at this time or make any showing whatever as to the real cause of detention of this Chinaman?

Mr. RICHEY.—At this time, no, your Honor.

The COURT.—In this proceeding?

Mr. RICHEY.—No, your Honor; on this basis [58] that your Honor is not entitled to go into any of the facts after your Honor has ascertained that the Commissioner before whom this proceeding was brought has jurisdiction in this matter—that your Honor will not go into the facts any further than the ascertainment of whether or not the Commissioner had jurisdiction.

The COURT.—Have you any cases that hold that?

Mr. SEABURY.—We will not dispute the cases calling attention to the fact that the writ of *habeas corpus* cannot be used as a writ of error.

The COURT.—I mean general statements. I mean specific cases where that position is held. The position of counsel is so new to the Court that I want to be sure.

Mr. RICHEY.—I would have to get them, your Honor.

The COURT.—You have not read any carefully?

Mr. RICHEY.—Well, here are some. I think that I should say holds that specific thing.

The COURT.—You have not cited any case here that I should say holds that specific thing.

Mr. RICHEY.—I have not read any cases to your Honor. The moment it be shown that the complaint has been lodged before a Commissioner, charging that [59] the defendant was a Chinese person unlawfully within the country, there is no inquiry upon the writ of *habeas corpus* providing no abuse has been done the defendant in the prosecution of that matter. Of course, if the Government had prolonged and kept the man a prisoner for months, we do not contend for a moment that he would not have the right to force matters under such a condition.

The COURT.—But suppose it appear upon the showing that the arrest was merely arbitrary; that there was no cause for it—no reason for it. Would the Court then remand the case and not go into it? I do not understand that to be the law.

Mr. RICHEY.—No—

The COURT.—That is the position here—that is exactly the position here.

Mr. RICHEY.—We will be glad to show that it has not been arbitrary. We have witnesses here ready to go to trial down there this afternoon.

The COURT.—We must dispose of this inquiry, and care nothing about the other except as it bears upon the right of the Court to proceed with this investigation. Under the showing here, it does appear that this man was arbitrarily held and is arbitrarily held because he has a certificate valid upon its [60] face and there are no facts to show that this certificate was invalid.

Mr. RICHEY.—There is no contention that it is invalid. We do not contend that it is invalid.

The COURT.—Is there any contention that this certificate be wrongfully in the possession of this defendant? He has the right to use it so long as it has not been determined that he is unlawfully here.

Mr. RICHEY.—That might be a question as to what might be determined lawfully in possession.

The COURT.—On the face of this return, Mr. Richey,—we tried the issue raised by the return. Now, from the return—we are bound by the return—what may lie back of the return?

Mr. RICHEY.—The return to the writ denies that the defendant has any right to be in the United States.

The COURT.—That is a question of law—the purpose of the writ. Exhibit the facts, nothing more. Exhibit the facts, whatever they may be. If this man has forfeited his right and standing under this certificate, that fact can be disclosed and might be an issue to try.

Mr. KENT.—I think Mr. Richey's position is that this Court has no right to try this case and it ought to be done before the Commissioner.

[61] The COURT.—I think it resolves itself down to this proposition: it having appeared here that a warrant of arrest was issued under a complaint sworn to before the Commissioner, and that the defendant was arrested under this warrant, and that this ends this examination and further proceedings must terminate and the man may be remanded to await the result of that contention.

Mr. RICHEY.—That is my contention, your Honor. Unless this Court here will hold that this complaint is not a sufficient complaint—

The COURT.—If we take that extreme view—say, ordinarily, that this is a case where the Court should exercise its discretion so as to permit these examinations to be held by the committing magistrate rather than by the Court by whom the writ is issued. Suppose we take that extreme view. If it should affirmatively appear here from the showing made that the detention was unlawful—that is to say that there was no warrant for the detention—it is only in those cases where a substantial question of fact is raised to be tried, and a finding of fact to be made by the Court, and where the Court would decline to proceed to make a finding of fact, that it would remand the case to the committing magistrate to make [62] the finding. It is difficult for the Court to conceive upon what theory the Government wishes to proceed against this Chinaman in the face of that certificate. Upon the face of that certificate, it does look like an arbitrary arrest.

Mr. RICHEY.—The Government informed counsel for the defendant that the defendant went out of the United States and the—

The COURT.—The Court has not been advised as to that.

Mr. KENT.—The contention of Mr. Richey is that this case should be remanded and heard before the Commissioner.

The COURT.—I am not certain—in some cases I would say that, if it is a question of fact, and not a

question of law—I would not remand a case upon a question of law—but upon a question of fact I am inclined to think I would. What question of fact is there in this return? None at all. This is not a question of fact—it is a question of law. Let me see the original petition. I think, Mr. Richey, if you will examine those cases, you will find that in every instance where the courts have remanded the cases, it was because of some issue of fact to be tried and determined. I know of no [63] instance where a Court of superior jurisdiction has remanded a case to a Court of inferior jurisdiction when the right of the defendant turns upon a question of law. Can counsel?

Mr. KENT.—I am quite sure that your Honor is right. As your Honor has suggested, it was a question of fact, but here it is a mere question of law—your Honor can do nothing under the circumstances but grant the motion.

The COURT.—If it be true that this man has a merchant's certificate, I am inclined to think—

Mr. RICHEY.—It is not a merchant's certificate.

The COURT.—It is a question of law whether it is a merchant's certificate or a laborer's.

Mr. RICHEY.—It is neither.

The COURT.—How is it treated?

Mr. RICHEY.—It is simply not a laborer's.

Mr. KENT.—This is a certificate of his right to remain here, and he is described as a person other than a laborer.

Mr. RICHEY.—Laborers cannot come here.

Mr. SEABURY.—He was indisputably here.

The COURT.—I don't see any reason why the Court should remand the defendant upon the questions [64] of law raised by this return.

Mr. RICHEY.—We have raised question of fact in our answer. They say he has been here all the time. We deny—

The COURT.—That is an immaterial fact.

Mr. RICHEY.—That is part of the case—he was out of the country.

The COURT.—Do you affirmatively say that he has been out of the country?

Mr. RICHEY.—They affirmatively set up that he has been here, and we deny that he has been here. In substantiation of their claim, they produce a certificate, and we are ready to produce evidence to controvert it.

The COURT.—You say you are ready?

Mr. RICHEY.—Yes.

The COURT.—You say you are ready now to raise that?

Mr. RICHEY.—Yes.

The COURT.—Why not set it up?

Mr. RICHEY.—We thought we set it up.

Mr. KENT.—Your Honor, I think that every opportunity has been given. Mr. Richey's position has been explained several times; that this Court has no power to try this, but it should go back to the [65] Commissioner. We are here now, your Honor, upon the sufficiency of this return.

The COURT.—What do you say about this return? Is there any denial of your allegations of his

being in the country a number of years sufficient to raise that?

Mr. KENT.—Their allegations in their return is immaterial—nothing further than in the complaint that that certificate was issued to us. We produced the certificate here, and that is absolute authority for this man to be in the United States. There is nothing set up to controvert it. There is nothing for your Honor to do. There is no issue to try.

Mr. SEABURY.—For example: Suppose, if your Honor please, if the case went to trial, we would ask for a concession of identity; we would offer the certificate and rest.

Mr. KENT.—And they could offer no evidence on their part, and the evidence is inadmissible, as you suggest, under the pleadings. That is why we have a right to make a motion on the pleadings. They raise no issue.

Mr. SEABURY.—It is true that we did recite the history of the case to show that the man had been domiciled in the United States since early boyhood. **[66]** That is really immaterial, and merely done to support the fact that he is an established domiciled person in the United States. I think it is clear that there is no issue before the Court except our motion for judgment, which is purely a question of law. The only question raised by the petition and the return is a question of law.

Mr. RICHEY.—Having set up the residence, and it being denied, it does become material then?

The COURT.—I don't know whether it is the denial of a material allegation or whether it goes—

Mr. SEABURY.—But, your Honor, if it be denied, the production of the certificate recites—the certificate establishes his right to be and remain in the United States.

The COURT.—Calling attention to the particular denial in the answer, they raise the question of this issue.

Mr. RICHEY.—It is about three-quarters of the way down on the second sheet.

[Order Granting Motion.]

The COURT.—That is not a denial of its truth. It alleges that all of the allegations are denied, and, even, if true, are immaterial, irrelevant and incompetent. I don't think that general denials of that character raise an issue in *habeas corpus* [67] matters. The motion is granted.

Mr. RICHEY.—Exception.

Mr. KENT.—The record may show that the judgment on the pleadings is granted.

Mr. RICHEY.—We take exception.

[Certificate of Stenographer to Transcript of Record of Proceedings Had on March 3, 1913.]

[68] State of Arizona,
County of Maricopa,—ss.

I, Raymond Allee, do solemnly swear that I am the stenographer who took down in shorthand the proceedings in the District Court of the United States for the District of Arizona, on the third day of March, 1913, taken and had in the matter of the application of Jim Hong for a writ of *habeas corpus;*

and that the foregoing transcript, being pages 1 to 67, inclusive, is a full, true and correct record of all the proceedings taken and had at said hearing to the best of my skill and ability.

RAYMOND ALLEE.

Subscribed and sworn to before me this 19th day of June, A. D. 1913.

MAYNARD A. FRAZIER,
Notary Public.

(My commission expires November 20th, 1916.)

[Praecipe for Transcript of Proceedings Had on March 3, 1913.]

[69] June 21, 1913.

Dear Sir:

Please include in the transcript of record to be lodged with the Clerk of the Circuit Court of Appeals for the Ninth Circuit, the transcript of the proceedings had before the U. S. District Court for the District of Arizona on March 3, 1913, in the Habeas Corpus proceedings of Jim Hong and oblige,

Yours truly,
EDWARD KENT,
By W. M. SEABURY and
W. M. SEABURY,
Attorneys for Jim Hong.

To Hon. ALLAN B. JAYNES,
Clerk of the U. S. District Court, District of Arizona.

[Certificate of Clerk U. S. District Court to Supplemental Transcript of Record.]

United States of America,
District of Arizona,—ss.

I, Allan B. Jaynes, Clerk of the United States District Court for the District of Arizona, do hereby certify that *that* the foregoing pages numbered 1 to 69 inclusive, constitute and are a true and complete SUPPLEMENTAL TRANSCRIPT OF THE RECORD in the Matter of the Application of Jim Hong for a Writ of Habeas Corpus, No. C.–418, in said court, being a copy of the Transcript of the Proceedings in said cause before Honorable Richard E. Sloan, Judge, filed in the office of the Clerk of said court subsequent to the preparation of the Transcript of the Record on Appeal in said cause.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court this 25th day of June, A. D. 1913.

[Seal] ALLAN B. JAYNES,
Clerk, United States District Court, District of Arizona.

[Endorsed]: No. 2278. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Jim Hong, Appellee. In the Matter of the Application of Jim Hong for Writ of Habeas Corpus. Supplemental Transcript of Record. Filed by and on Behalf of Appellee. Upon Appeal from the United States District Court for the District of Arizona.

Filed August 16, 1913.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States Circuit Court

Of Appeals For The Ninth Circuit

IN THE MATTER OF THE APPLICATION OF JIM HONG FOR A WRIT OF HABEAS CORPUS. } ON APPEAL.

C. A. OVERLOCK, United States Marshal,

Appellant.

vs.

JIM HONG,

Appellee.

BRIEF OF APPELLANT

This action arose out of the petition of Jim Hong, filed in the United States District Court for the District of Arizona, praying for a writ of habeas corpus, directed to the United States Marshal for the District of Arizona, to produce the body of the said Jim Hong before said court, to the end that he, the said Jim Hong, be discharged from unlawful restraint and custody. The writ was granted; the said Jim Hong was before said court; a hearing was had, and he was, by the said court, ordered discharged, and the said court in its final order gave petitioner judg-

ment on the pleadings; found that petitioner was then and at all times theretofore had been, lawfully within and was entitled to be and remain within, the United States; that he was then unlawfully restrained of his liberty; and, that he be discharged from custody. Whereupon this appeal was taken to this Court.

STATEMENT OF FACTS

On the 21st day of November, 1912, in the city of Phoenix, District of Arizona, one Jim Hong, a Chinese person, was arrested on a warrant issued by a duly appointed, acting and qualified United States Commissioner, residing in the City of Phoenix, Arizona, upon a sworn complaint theretofore made before and filed with said Commissioner by O. T. Richey, Assistant United States Attorney for the District of Arizona, charging that said Jim Hong was a person of Chinese descent unlawfully within the United States. Said Jim Hong was taken before the said Commissioner, arraigned, pleaded not guilty, and gave bond. At the request of counsel for said defendant Jim Hong the trial of the case was delayed and postponed, the United States being at all times ready to proceed therewith, and the case was finally set for trial before the Commissioner for the third day of March, 1913, by agreement. On the 27th day of February, 1913,

the said Jim Hong, through his counsel, filed his petition for a writ of habeas corpus in the United States District Court for the District of Arizona, before Hon. Richard E. Sloan, portions of which said petition are as follows, to-wit:

> "x x x 1892; and that your petitioner has since the said year, at all times been lawfully within the United States, and has never during said time departed therefrom."
>
> (T. of R. p. 1).
>
> "That he was born in Canton, China, and first came to the United States in or about the year 1874."
>
> (T. of R. p. 2).
>
> "He returned to this country and was admitted into this country again x x x about the year 1890."
>
> (T. of R. p. 2).
>
> "Nor did he at said time, or at any time conceal any facts whatever concerning himself from the authorities of the United States having charge of the admission into this country of persons of Chinese descent."
>
> (T. of R. p. 3).
>
> "About the year 1894, at which time your petitioner went to the City of Houston; x x x thereafter he went to Beaumont, Texas, and shortly thereafter established himself in business x x at Sour Lake, Texas."
>
> (T. of R. pp. 3 and 4).
>
> "He remained x x x in Sour Lake, Texas, for a period of eight or nine months and x x x because

of the misfortune x x x your petitioner returned to Beaumont, Texas, and thereafter returned to San Francisco and Sacramento, California, in which places he remained until about the year 1910, at which time he came to the City of Phoenix, in the Territory of Arizona."

(T. of R. p. 4).

The petition further alleges that the petitioner was at the time of its filing in the custody of the United States Marshal for the District of Arizona, under the said warrant, and that he was held to await an order of deportation to be made (T. of R. p 6), and prays that a writ of habeas corpus issue, etc. The petition is verified before the Clerk of said court.

Upon this petition there issued out of said court a writ of habeas corpus, commanding the United States Marshal for the District of Arizona to bring the body of Jim Hong, the writ and the cause of the said Jim Hong's detention, before the Hon. Richard E. Sloan, Judge of the United States court for the District of Arizona, on the third day of March, 1913. That almost immediately after the issuance of said writ, the said Judge admitted the said Jim Hong to bail in the sum of five hundred dollars, which was furnished, thereby depriving the Marshal of the power to comply with the command in the writ contained with reference to producing the body of Jim Hong before the court. That immediately prior to the filing of the said petition, Jim Hong, his counsel, and one of his bail, came to Deputy United States Marshal B. Anderson, and said counsel and bail attempted

to deliver said Jim Hong into the custody of the Marshal, and asked the Deputy to not place Jim Hong in jail, but to permit him to sit in his office for a short period of time; this the Deputy Marshal permitted to be done. While the said Jim Hong was thus sitting in the office of the said Deputy Marshal, the petition was filed, the writ issued and served upon the Deputy Marshal. Immediately thereafter the order was made admitting Jim Hong to bail in the same sum and, the same persons qualifying as his sureties, the said Jim Hong was released, not more than thirty minutes having elapsed between the attempted surrender of the petitioner and his liberation on bail.

On March 3, 1913, the Marshal made his return to the writ (T. of R. p 14), and at the same time O. T. Richey, Assistant United States Attorney, on behalf of the United States, moved the court that the United States be permitted to intervene, and offered a pleading in intervention in the habeas corpus proceeding, which pleading does not appear in the Transcript of the Record. The Court overruled the motion and refused the offer of the pleading. Thereupon the Marshal requested that he be permitted to amend his return, which request was granted. Thereupon the Marshal filed his first amended return (T. of R. p. 18), and the United States, through the said Assistant United States Attorney, again moved the court that it be permitted to intervene, and offered the same pleading. Said motion was again overruled and said offer again refused. Thereupon the Marshal was again permitted to amend his return (T. of R. p. 21), and thereafter the Marshal filed his second amended return, which contains many mat-

ters and things which, according to the contention of the United States, should have been set up in a petition in intervention on behalf of the United States, or otherwise brought to the attention of the court, had the court permitted the United States to intervene. Demurrer was filed to the first and second amended returns of the Marshal, and upon the pleadings therein named argument was had by respective counsel.

The Court ruled that it had jurisdiction to inquire into the probable cause, but did not state that it was its desire to go into that matter; Mr. Richey, the Assistant United States Attorney, stating to the court that, if it were going to take up the matter of probable cause, the United States had present in the court room two witnesses who would testify that the petitioner had been for several years in Mexico since the issuance to him of the certificate of residence, and that he had not complied with the law relating to the departure from and return to the United States of duly registered Chinese persons. The Court, however, declined to receive such testimony, and proceeded, upon motion by petitioner's counsel, to make its final order and gave judgment on the pleadings (T. of R. p 36), discharged the petitioner, and made the following finding:

> "And it appearing to the court's satisfaction that the said Jim Hong is now and at all times since the issuance to said Jim Hong of a certificate numbered 137,804, heretofore duly issued by the officers of the Government of the United States to the said Jim Hong, has been a person lawfully within the United States, and that the said Jim Hong is the person named therein, establishing

the right of the said Jim Hong under said certificate *lawfully to be and remain within the United States.*"

From this final order this appeal is taken.

ASSIGNMENTS OF ERROR.

Assignment of Error 1.

The Court below erred, in denying to the United States the privilege of intervening, and in denying to the United States intervention in its own behalf in addition to any return the United States Marshal might make.

Assignment of Error 2.

The Court below erred, in ruling that it had jurisdiction of the body of the petitioner.

Assignment of Error 3.

The Court below erred. in giving petitioner judgment on the pleadings.

Assignment of Error 4.

The Court below erred, in discharging petitioner and making its findings without taking the testimony of two competent, material and reliable witnesses, then present in the court room, that petitioner had been in Mexico for several years since the issuance to him of a certificate of residence.

Assignment of Error 5.

The Court below erred, in finding and determining, without a trial thereof in due course, that petitioner is lawfully within, and entitled to be and remain within, the United States, the Court below on habeas corpus proceedings possessing no jurisdiction or authority whatever to make any such findings or decree, nor to try such issue on habeas corpus proceedings.

Assignment of Error 6.

The Court below erred, in finding that petitioner was unlawfully restrained of his liberty.

Assignment of Error 7.

The Court below erred, in its Final Order and Decree, the same being contrary to law, the pleadings and facts.

Assignment of Error 8.

The Court below erred, in exceeding its jurisdiction in making any findings whatever other than; whether the Court below obtained and had jurisdiction of the subject matter; whether the Court below obtained and had jurisdiction of the body of petitioner; whether petitioner was unlawfully restrained of his liberty.

Assignment of Error 9.

The Court below erred, in ruling that Section 1018 R. S. U. S. does not obtain in the surrender of a defendant on bail in Chinese Exclusion actions before U. S. Commissioners.

ARGUMENT.

The jurisdiction of the Court below, in the first instance, depends upon the petition containing such statements of fact, that, if true, the United States Commissioner failed to have jurisdiction of the defendant, or, of the matter; or, that the petition made the showing that there were such gross delays and long incarceration of the defendant without opportunity for trial or hearing as to be unreasonable, unjust and to the prejudice of the rights of the defendant.

Was the petitioner, in fact, actually under such restraint and in such custody as to be restrained of his liberty so that he would be entitled to a writ of habeas corpus? He had never been, by order or command of the Commissioner, committed to the custody of the United States Marshal. True, the Marshal arrested him, but delivered him, on the warrant, into the custody of the Commissioner; he was arraigned; pleaded not guilty; and, thereupon, was immediately enlarged on bail by the Commissioner to appear for trial at a date to be later determined upon, this latter at the special instance and request of the defendant.

On February 27, 1913, a few days before the day which had been set for the trial of the case before the Commissioner, viz., March 3, 1913, and with the evident purpose of placing himself in a technical custody, so that he might, by petition, show apparent right for the issuance

of a writ of habeas corpus, to which we contend he was never entitled, petitioner attempted to have himself surrendered to the custody and restraint of the United States Marshal, as fully appears from the statement of facts included in this brief. We respectfully urge that the mere delivery of the petitioner into the custody of the United States Marshal by one of his bail is absolutely insufficient, either under Section 1018 R. S. U. S., or the common law rule bearing upon the subject, to place him in the legal custody of that officer. Section 1018 provides, in substance, that the defendant may be arrested by his bail and delivered to the Marshal before any judge or other officer having power to commit for the offense charged, and that, at the request of the bail, the judge, or other officer, shall recommit the party so arrested to the custody of the Marshal. The common law rule upon this subject is practically identical with the above cited statute.

U. S. vs. Stevens, et al., 16 Fed. 101.

The mere delivery of the petitioner to the Marshal gave that officer no authority whatever to restrain him. No recommitment was issued, he had no mittimus, nor any other order or legal document instructing and authorizing him to detain the petitioner. Such unauthorized and unwarranted restraint certainly could not be considered the confinement and custody which would authorize the issuance of the writ of habeas corpus. In fact, it cannot be considered a restraint, confinement, or custody at all, as the Marshal had no right, in law, to restrain or confine the petitioner without process of some nature. If the action be, as contended by petitioner, purely civil in its

nature and not governed by Section 1018, as was held by the lower court, then the rule certainly should be that, when the bail desires to surrender a defendant in a Chinese deportation case, they should be required to take him before some officer authorized to commit him and there deliver him into the custody of the Marshal and cause the committing officer to issue the proper papers authorizing the Marshal to restrain and confine the defendant.

Attached to the petition is a copy of the complaint filed before the Commissioner and the warrant issued thereon, which show upon their face that they are not defective, and the court, of course, takes judicial knowledge of the competency of its Commissioner. Therefore, the Commissioner had jurisdiction of the matter. The petition alleges the residence of the petitioner to be in Phoenix at the time of his arrest, and, as the complaint shows that the United States Commissioner also resided in Phoenix, that officer was the nearest Commissioner to the place were the petitioner was arrested. Therefore, the Commissioner had jurisdiction of the body of the petitioner.

Section 19, Act May 28, 1896, 29 Stat. L. 184.
Act August 18, 1894, 28 Stat. L. 416.
Act. March 3, 1901, 31 Stat. L. 1093.
Section 13, Act. Sept. 13, 1888, 25 Stat. L. 476-7, as re-enacted in the Act of April 27, 1904, ch. 1630.

According to our contention, the only matter then left into which the Court could lawfully inquire was probable cause under extraordinary circumstances, which do not appear.

It will be observed that the trial of the case before the Commissioner had been continued from time to time, always at the request of petitioner's counsel, until it was finally set for trial on the 3rd day of March, 1913, the very day upon which the final order in the habeas corpus proceeding was made. There is no showing whatever that the petitioner was denied a speedy trial, that he had been in restraint an unreasonable length of time, that the United States was guilty of any laxness, that petitioner had been deprived of any right before the Commissioner, or that petitioner had at any time applied to the Commissioner for any relief from the alleged wrongs complained of in his petition; on the contrary, it clearly appears that the delay in the trial of his case was at his own special instance and request. Under these circumstances, no writ should have issued in the first instance, and the writ having issued, we contend that the lower court had no right whatever to investigate the question of probable cause. To do so would be and was simply usurpation of the lawful powers and duties of the United States Commissioner. We concede that, in an extreme case, where through the fault of the prosecuting officers, unreasonable or unwarranted delay in the trial of an action of this nature has resulted, the question of probable cause might properly be investigated by the District Court, or the judge thereof, in a habeas corpus proceeding. Such, however, is the exact contrary to the case at bar.

The pleadings showing that the complaint, warrant and other formal documents were in regular and lawful condition, and the court not having the authority to inves-

tigate the question of probable cause in this particular case, the judgment on the pleadings should have been that the petitioner be remanded.

"If an inferior court or magistrate of the United States has jurisdiction, a superior court of the United States will not interfere by habeas corpus."

Horner vs. U. S. 143 U. S. 570; 36 Law Ed 266

"If this court may issue a writ of habeas corpus x x x there can be no discharge under it if the court-martial had jurisdiction to try the offender for the offense with which he was charged, and the sentence was one which the Court could, under the law, pronounce."

Ex parte Mason, 105 U. S. 696; 26 Law Ed. 1213.

"The jurisdiction of this court to review the judgments of the inferior courts of the United States in criminal cases, by the writ of habeas corpus or otherwise, is limited to the single question of the power of the court to commit the prisoner for the act of which he had been convicted."

Ex parte Caroll, 106 U. S. 521; 27 Law Ed. 288.

"This Court cannot discharge on habeas corpus a person imprisoned under the sentence of a Circuit or District Court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold the prisoner under the sentence. A certified copy of the record of a sentence to imprisonment is sufficient to authorize

the detention of the prisoner, without any warrant or mittimus."

Ex parte Wilson, 114 U. S. 417; 29 Law Ed. 89.

"This Court has no jurisdiction for the discharge on habeas corpus of a person who is imprisoned under the sentence of a territorial court in a criminal case, on account of irregularities in the proceedings. The objections that the grand jury was inproperly constituted and that the defendant was denied compulsory process for witnesses go only to the irregularities of the proceedings, not to the jurisdiction of the court."

Ex parte Harding, 120 U. S. 782; 30 Law Ed. 824.

"Neither irregularities nor error, so far as they are within the jurisdiction of the court, can be inquired into upon a writ of habeas corpus—because a writ of habeas corpus cannot be made to perform the function of a writ of error in relation to proceedings of a court within its jurisdiction. Under a writ of habeas corpus the inquiry is addressed not to errors, but to the question whether the proceedings and the judgment rendered therein are, for any reason, nullities, and unless it is affirmatively shown that the judgment or sentence, under which the petitioner is confined, is void, he is not entitled to his discharge."

U. S. vs. Pridgeon, 153 U. S. 62; 38 Law Ed. 631.

Ex parte Watkins, 3 Peters, 193; 7 Law

Ed. 650.

In re Li Sing, 86 Fed. Rep. 896.

In re Leo Hem Bow, 47 Fed. Rep. 302.

In re Gut Lun, 83 Fed. Rep. 141.

Habeas corpus will only inquire into the jurisdicton of the Commissioner in the premises.

In re Tsu Tsé Mee, 81 Fed. 702.

In re Metzger, 5 How, 176; 12 Law Ed. 104.

In re Kaine, 14 How. 103; 14 Law Ed. 345.

Grin vs. Shine, 187 U. S. 181; 47 Law Ed. 130.

In re Cuddy, 131 U. S. 280; 33 Law Ed. 154;

Wight vs. Nicholson, etc., 147 U. S. 136; 33 Law Ed. 865.

In re Rullo, 43 Fed. Rep. 62;

Ekin vs. U. S., 142 U. S. 651; 35 Law Ed. 1146.

Writ of habeas corpus will not issue pending examination, where petition fails to state facts showing that the magistrate is without jurisdiction, and should be dismissed immediately upon ascertainment that the magistrate had jurisdiction.

In re Green, 60 Pac. 82.

In re Hacker, 73 Fed. Rep. 464.

And will not interfere with magistrate if he have jurisdiction.

Price vs. McCarthy, 89 Fed. Rep. 84.

Horner vs. U. S. 143 U. S. 570; 36 Law Ed. 266.

And is not to fulfill the functions of an appeal or writ of error.

Ex parte Tyler, 149 U. S. 164; 37 Law Ed. 689.

In re Swan, 150 U. S. 637; 37 Law Ed. 1207.

No formal or written complaint is necessary to give jurisdiction to Commissioner in Chinese Exclusion cases.

Wong Quan and Lee Joe vs. U. S., 149 U. S. 698; 37 Law Ed. 905.

Ah How vs. U. S., 193 U. S. 65; 48 Law Ed. 619.

Even where right under the Federal Constitution has been denied, it would seem to be the better practice to leave petitioner to his remedy by direct proceedings.

Reid vs. Jones, 187 U. S. 153; 47 Law Ed. 116.

Where petitioner fails to show in his petition that he has invoked the action of the Commissioner upon the matters complained of in his petition, the writ should not have issued.

In re Lancaster et al., 137 U. S. 393; 34 Law Ed. 713.

In re Bonner, 57 Fed. Rep. 184.

If it appear jurisdiction has not been exceeded and the proceeding is regular on its face, the petitioner will be remanded.

Turner vs. Conkey 31 N. E. 777.

"Habeas corpus will not bring into review errors

and irregularities, whether relative to substantive rights or law of procedure of a court with jurisdiction, the remedy being by appeal, exception, or writ of error."

Dimmick vs. Tompkins, 194 U. S. 540; 48 Law Ed. 1110.

Harkrader vs. Wadley, 172 U. S. 148-164; 43 Law Ed. 399-404.

Ex parte Comn. Wlth. Virginia and Coles. 100 U. S. 339; 25 Law Ed. 676.

Ex parte Albert Siebold, 100 U. S. 371; 25 Law Ed. 717;

U. S. vs. Pridgeon, 153 U. S., 48-63; 38 Law Ed. 631-637;

In re Chow Loy, 110 Fed. Rep. 952.

Ex parte McMinn, 110 Fed. Rep. 954.

"Pending proceedings for extradition regularly and constitutionally taken under the Acts of Congress cannot be put an end to by writ of habeas corpus."

Terlinder vs. Ames, 184 U. S. 270; 46 Law Ed. 534.

The petitioner maintains that the action before the commissioner is entirely civil in its nature.

"As a general rule the court will not in habeas corpus proceedings on behalf of one confined under mesne process in a civil action inquire into the truth of the facts alleged in the declaration and affidavit upon which the order of arrest is made."

State vs. Bridges 64 Ga. 146-155.

In the last cited case the court says that to do this "would be to engage the habeas corpus court in a work of subsoiling which can be fitly done only by the court in which the main action is pending, and upon a regular trial in the due course of the proceedings."

Petitioner alleges he is a person other than a laborer, on the basis that his certificate so states. The certificate states him to be a "person other than laborer", *but* in describing his occupation in said certificate states it to be "Restaurant Keeper". A restaurant keeper is a laborer regardless of any statement to the contrary in his certificate of residence, and any such statement in the certificate that he is not a laborer is not binding or controlling. The petitioner, Jim Hong, is a laborer under the provisions of the laws and treaties governing persons of Chinese descent while in the United States.

U. S. vs. Chung Ki Foon, 83 Fed. Rep. 143.

And the United States Commissioner had jurisdiction to try and determine whether he had violated the Chinese Exclusion laws. This is too well established to require authorities thereon.

Upon the ruling of the Court that Jim Hong had been legally surrendered, the United States moved the Court that it be allowed to intervene and, through its Attorney, O. T. Richey, Assistant United States Attorney for the District of Arizona, offered its pleading in intervention. The Court ruled that there was no provision for such course and overruled the motion and rejected the offer of the pleading. It must be plain to any Court that the United States has such an interest in the disposition of a person

of Chinese descent under the Chinese Exclusion laws as to entitle it to be a party to any proceeding affecting such disposition and the United States should have been permitted to intervene.

In re Wong Kim Ark, 71 Fed. Rep. 382.
In re Jung Ah Lung and Jung Ah Hon, 25 Fed. Rep. 141.
Ex parte Chin King and Chan San Hee, 35 Fed. Rep. 354.

If the Court was going to take into consideration probable cause of restraint, it was its duty to institute such inquiry and it should have indicated to the United States that such was the intention of the Court, especially in view of the request of the United States that the Court so indicate one way or the other, and the Court, refusing to so indicate, after such request on the part of the United States, together with the statement that the United States had two reliable and competent witnesses then in the Court Room, each of whom would testify that the petitioner had been in Mexico for several years since the issuance to him of his certificate of residence, should not have considered the certificate of residence offered by petitioner unless the witnesses were permitted to testify. The Court, if it was going into probable cause, was, in duty bound, of its own motion, to direct such inquiry. Shall a court sit dumb when such request be made under such circumstances and then afterward be heard to say: "Yes, you said that, but you did not call your witnesses and have them sworn." Is that the course our courts shall take in such proceedings and under such circumstances? We think not.

Is the Final Order of the Court below on the pleadings? If it is, what consideration was given the certificate mentioned in the Final Order? If it is on evidence in probable cause, why is the mention made of judgment on the pleadings? Is the Final Order made on the pleadings, or on evidence of probable cause? In either case such Final Order should not of right have been made. There was no sufficient showing in the petition or otherwise.

But it is against the action of the lower court in affirmatively attempting to establish in its final order the status of the petitioner that we most urgently protest. In said final order the court solemnly states, as an adjudicated fact, that the petitioner is lawfully entitled to be and remain in the United States. Surely the only matters which the court had the right or authority to determine were whether the district court had jurisdiction of the person and subject matter; whether the United Sates Commissioner had jurisdiction of the person and subject matter; and, under the circumstances above set forth, whether there was probable cause upon which to restrain the petitioner. A careful and exhaustive examination of all of the cases of habeas corpus arising out of Chinese deportation proceedings shows that in no single instance has any court ever before so held. The law provides that the defendant shall have a trial before a United States Commissioner, and, if ordered deported, may appeal to the district court. This habeas corpus proceeding has been used as a vehicle to oust the United States Commissioner of his jurisdiction and of his right to try and determine the case. In habeas corpus proceedings, the court has but authority to remand or discharge the petitioner. We take it that

the propositions just stated in this paragraph are elementary, and confidently assert that the action of the lower court in making its finding that the petitioner was lawfully within the United States and entitled there to remain, was in gross and palpable excess of its authority. The petition for the writ contained no prayer asking that the petitioner's status be established, and the court, in making such finding, not only exceeded its jurisdiction, right and authority, but actually went without the pleadings to make the finding of which we complain. The only findings that the court was lawfully entitled to make were either that the petitioner be remanded, or that he be discharged.

The entire proceeding in the court below is replete with error. The lower court had no jurisdiction in the first instance to issue the writ, and, upon the showing made in the pleadings, should have at once dismissed the same and remanded the petitioner. The findings, orders and judgment are in excess of its jurisdiction, and the court had no right whatever to determine the status of the petitioner.

The case should be reversed and the petitioner ordered remanded to answer the complaint before said United States Commissioner C. W. Johnstone.

Respectfully submitted,

J. E. MORRISON,

United States Attorney for the District of Arizona.

O. T. RICHEY,

Asst. United States Attorney for the District of Arizona.

No. 2278.

United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA,

Appellant,

vs.

JIM HONG,

Appellee.

In the Matter of the Application of JIM HONG for a Habeas Corpus.

APPELLEE'S BRIEF.

This is an Appeal by the United States Marshal for the District of Arizona from a final order rendered in a Habeas Corpus proceeding in the District Court, for the District of Arizona, discharging the Appellee from custody.

FACTS.

On or about November 20th, 1912, the Assistant United States Attorney, for the District of Arizona, made complaint in writing before the United States Commissioner in Phoenix, Arizona, (R 10) to the effect that "Jim Hong is a Chinese person not lawfully entitled to be or to remain in the United States, and that the said Jim Hong is now in the District of Arizona," and prayed that a warrant be issued "for the arrest of the said Jim Hong; that he may be dealt with in accordance with law" (R 10).

Thereafter on the same day, the warrant sought was

issued and executed by the arrest of Jim Hong (R 8-9)

After this arrest and pending a hearing thereon, the prisoner was admitted to bail by the Commissioner, and after one or more adjournments, the hearing before the Commissioner was set for March 3, 1913 (R 24-25).

On February 27, 1913, one of the bondsmen of the prisoner, surrendered him to the Deputy United States Marshal at Phoenix, Arizona. (S. R. 8-9-10)

Shortly thereafter on the same day, one of the counsel of the prisoner applied to the District Judge for a writ of habeas corpus, which writ was granted February 27. 1913, (R 11-12), and made returnable before the District Judge on March 3, 1913.

After the writ had issued, application was made to the District Judge to admit the prisoner to bail, pending the hearing thereon, and the Judge admitted the prisoner to bail accordingly (R 12), and the bond prescribed was duly given (R 13).

On March 3, 1913, the return day of the writ, the petitioner was produced in Court at the opening thereof, pursuant to the condition of the bond, and was again delivered into the custody of the Marshal (S. R. 2).

Thereupon, the Marshal filed his return to the writ (R 10-14).

This return presented for determination only a preliminary issue of fact, namely; whether when the writ

was issued, the prisoner was or was not in the custody of the Marshal. It failed to set forth the cause of the prisoner's detention and alleged an inability to have the body of the prisoner before the Court as commanded in the writ.

The prisoner immediately traversed this return, denied the facts alleged by the Marshal, and affirmatively alleged, under oath, (R 16-17) that at the time the writ was applied for and granted on February 27, 1913, the prisoner was in the actual custody of the Marshal.

The District Judge clearly stated that his jurisdiction of the proceeding would, doubtless, depend upon the determination of this question of fact, and that if the prisoner was in the Marshal's custody when the writ issued, the District Judge had jurisdiction to grant the writ and entertain the proceeding; otherwise such jurisdiction would not exist (S. R. 6).

This issue was determined in favor of the prisoner upon the offer of proof and the concession appearing at pages 8-9-10 of the Supplemental Record, and the conclusion was that jurisdiction existed (S. R. 20).

In accordance with the permission granted by the Court, the Marshal filed an amended return (R 18).

This amended return also failed to disclose or even to assert any cause whatever for the detention of the prisoner. It consisted in a further elaboration of the admitted facts concerning the prisoner's surrender to the

Marshal, and concluded with the statement in substance that such custody of the prisoner as the Marshal then had, he delivered to the Court, in accordance with the directions of the writ.

Thereupon, the prisoner demurred to the amended return (R 20) and moved for judgment discharging the prisoner, on the pleadings (S. R. 20).

After a brief argument, the District Attorney moved for and was granted leave (S. R. 22) to file a further and second amended return.

This second amended return (R-21) as a pleading was little, if any, better than the two preceding returns, and was wholly insufficient as a return.

It consisted chiefly of rambling argumentative statements, most of which were irrelevant to the issue.

It presented the District Attorney's views of the situation and contentions in substance, as follows: It admitted that the only cause of detention was the complaint and warrant, copies of which were attached to and made a part of the petition for the writ, but it sedulously avoided and deliberately suppressed a statement of any fact whatever from which either the Court or prisoner, or his counsel could ascertain even the general character and nature of the acts or omissions upon his part, with which the prosecution intended upon a hearing to charge the prisoner, and it was impossible to determine from

the record of what the alleged illegality of the prisoner's presence in the United States consisted.

Notwithstanding the failure of the Marshal to state facts from which the jurisdiction of the Commissioner to direct the apprehension and deteniton of the prisoner could be ascertained and determined by the District Judge, the anomalous contentions were made in substance (1) that the Commissioner had jurisdiction of the offense charged (R 27), in alleged consequence of which, the District Court had no jurisdiction in the premises, although the learned District Attorney admitted that it was the duty of the District Court to inquire into these very matters, as appears from the following excerpt from the second amended return (R 23).

> "And that the only matter under consideration by this Court is whether the United States Commissioner possessed jurisdiction in the premises complained of in the aforementioned complaint, and whether the detention, if detention there was, of the petitioner was proper."

In other words there was an admission that the Court might inquire into the cause of detention, but a persistent refusal to enlighten or inform the Court upon the subject and a total failure to show that the accused had committted any offense of which the Commissioner had jurisdiction and for which the accused could be lawfully deported. (2) The further contention was made in substance that the bail of the prisoner could only effect

a legal surrender of him by an observance of and compliance with the provisions of Section 1018 of the United States Revised Statutes, which provisions (admittedly) were not followed in the surrender, and that by reason of the failure to surrender as therein directed, as a matter of law, the prisoner was not in the custody of the Marshal when the writ issued, from which we assume that the District Attorney desires the inference to be drawn that the Court had no jurisdiction to grant the writ or to entertain the proceeding for this reason (R 28-29).

It is true that the second amended return contained general denials of almost all of the allegations of the petition, but these denials in every instance denied only legal conclusions or immaterial averments in the petition (R 23-24-25). The vital and essential allegations of the petition, namely; that the prisoner was then in custody detained under color of Federal process, and that the prisoner had a certificate of residence, which evidenced his right lawfully to be and remain within the United States, were alone sufficient to require the District Judge in the habeas corpus proceeding to inquire into the real cause of the prisoner's detention.

This second amended return contained admissions of these two vital propositions.

It admitted that the only process by which the prisoner was detained was that described in the petition (R

23), and that the prisoner had a certificate of residence, which (R 25)

> "pending the trial of the said Jim Hong upon the said complaint hereinbefore mentioned * * * was seized and held by the agents of the government of the United States, and that said certificate is now in possession of such agents and will be so held by such agents, subject to the use of said Jim Hong, as evidence of his right to be and remain within the United States."

This certificate, as appears from the record, pages 32-33, is one issued to a Chinese person *other than a laborer,* under the provisions of the Act of May 5, 1892, as amended by the Act approved November 3, 1893.

Upon the filing of this second amended return, counsel for the prisoner moved that the demurrer interposed to the amended return stand as a demurrer to the second amended return, and also moved for judgment upon the pleadings (S. R. 24).

The issues of law thus presented were argued at length (S. R. 24-54), and the prisoner's motions were finally granted (S. R. 54). The proceeding resulted in an order discharging the prisoner and adjudging his right to be and remain within the United States (R. 36), and from this order, this appeal is prosecuted (R 37-38).

Nine errors are assigned to the order of the Court below.

The first error assigned is that the Court below erred in denying the application of the District Attorney for leave to intervene.

We submit that this assignment is disposed of by the following considerations:

The appellant upon this appeal is the Marshal of the United States, for the District of Arizona. The government itself is not a party to the record, except as it is represented by the Marshal. It cannot be more of a party than it already is, whether the name of the government be substituted as appellant for that of the Marshal, as it appears in the record, or whether the government be represented by making the prosecuting attorney or some other officer a party to the record.

The interests of the government in this prosecution are amply fortified and protected by the Marshal, under the direction of the United States Attorney as counsel.

This is evident from the fact that the proposed petition in intervention became and was the second amended return, the word Marshal being substituted therein for the word intervenor. (S. R. p. 22).

Neither the government nor the Marshal were in any way aggrieved by the refusal of the Court to allow the United States Attorney to become a party to the record, and a consideration of this alleged error upon this appeal is wholly unauthorized and in reality, the record does

not present this question for review or consideration here.

If the learned United States Attorney feels aggrieved and prejudiced at his exclusion from the record in this cause as a party, his remedy, if any he had, was an appeal from the order denying his application to intervene.

If the question is reviewable at all, it clearly could only be so reviewed.

We deem this assignment so far beyond the matters which are properly the subject of review upon this appeal, that we preferred to discuss the assignment briefly at this point rather than to embarass and confuse our later argument of the propositions which are presented for review by such discussion.

Assignment four (R 39-40), is intended as an assignment that the Court erred in discharging the petitioner

> "without the introduction of the evidence offered by respondent, to-wit: the testimony of two competent, material and reliable witnesses that the prisoner had been in Mexico for several years since the issuance to the prisoner of the certificate of residence."

This assignment is wholly unsupported by the facts as is shown by the various returns interposed by the Marshal and by the argument of the United States Attorney (R 16-18-19-21-31) (S. R. 30 et seq.).

So also are the statements made by counsel at page 6 and 19 of appellant's brief.

We do not wish to attribute to our learned opponents any willful mis-statement of facts, but we vehemently and earnestly deny that counsel apprised the court below of his present assertion that he had witnesses who could testify that the prisoner had ever been in Mexico or elsewhere beyond the United States.

No such statement was ever made in the court below, and the record, the pleadings, and the argument of our opponents conclusively establish this to be the fact.

The entire assignment is based and predicated upon a false premise, namely: that the District Attorney offered or even informed the Court that he had the testimony of any witnesses (whether they supported the characterization and commendation of the District Attorney that they were not only witnesses but "competent, material and *reliable*" witnesses) that the prisoner had been in Mexico for several years since the issuance of his certificate of residence.

The entire record shows that the learned District Attorney persistently and stubbornly pursued a policy of secretion and concealment as to the real facts behind the blanket charge of an illegal presence within the United States.

Beginning with the first return, instead of a frank statement of the cause of the prisoner's detention and an assertion of the ground upon which it was claimed that he had lost his right to be and remain in the United

States, as evidenced by his certificate of residence, we find merely the assertion that the prisoner was not in the Marshal's custody, and that he could not, therefore, be produced as directed (R 15).

When this shallow pretext was dissipated by proof to the contrary, an amended return was filed, which only detailed the facts then already established by proof concerning the surrender of the accused (R 18), and finally the substance of the second amended return upon this point was (R 22) that the habeas corpus proceeding was an attempt

> "to force the United States to prosecute the complaint that Jim Hong is a person of Chinese descent unlawfully in the United States, in this Court in the first instance instead of in the Court of the United States Commissioner, C. W. Johnstone, the Commissioner before whom the complaint hereinbefore mentioned was filed."

Not a word or suggestion can be found in any of the returns that the basis for the prisoner's arrest was that he had since the issuance of his certificate of residence been in the Republic of Mexico or elsewhere beyond the United States, and, indeed, the suggestion now creeps into the record for the first time while this cause is pending in this Court upon appeal.

It is easy to see from an inspection of the Supplemental Record that our learned opponent persistently refused to offer any proof whatever to sustain the le-

gality of the prisoner's arrest and detention, or to put his pleadings in such shape that such proof would have been admissible under them, had it been offered and, moreover, that the learned Court below, not once but many times made it perfectly clear that if the District Attorney had any proof to offer ample opportunity for further amendment would be accorded him and the evidence, if offered, received and examined.

Thus counsel for the government defines his position, as follows (S. R. 30):

"The only charges that the United States has to make is to charge that he is here unlawfully,—and all the charge that is necessary, is that he is here unlawfully—don't need to sign a complaint—take him before a Commissioner without any papers at all and state that he is here unlawfully.

THE COURT—Suppose he produces a certificate?

MR. RICHEY—It is up to the United States to controvert it. The United States has never been given an opportunity to controvert it. The trial has not been had.

THE COURT—This is a habeas corpus matter, and it is your duty and you must show by what authority he is detained.

MR. RICHEY—But, if your Honor please, it should be done before the Commissioner.

THE COURT—There is nothing in that contention that the District Court of the United States cannot inquire into the question of a detention on habeas

corpus. Then, if it does and the court has jurisdiction and the question is raised, it is for the Government to show the cause of his detention, and the cause of his detention is that he is here without a certificate or that he is a Chinese person, a laborer, here without a certificate.

MR. RICHEY—That is our contention; and it being his duty to show by affirmative proof his right to remain here, and there being an appeal from that Court, this Court will not look into these matters.

THE COURT—This is just the purpose of the writ of habeas corpus. That is just the purpose of it—exactly so. The purpose is not anything more than to require the United States in this form of proceeding to show affirmatively—I take it that the very distinction between the two cases is what led to the bringing of this matter rather than by the ordinary procedure before the Commissioner to determine it. It is the right of that man to appeal to this Court, and we have no business to deny a writ of habeas corpus when presented. When presented it is the business of the Government to come in with its showing. It makes no difference what we think of it—of the propriety of it—it is a duty thrust upon us, and we must comply with that duty. Now, here we are: it is a writ of habeas corpus, and *if the Government wants to present what it has in the way of a showing why this man should be detained, it ought to be produced so that we can inquire into it.* We have the jurisdiction. It is our duty to hear it. That jurisdiction being invoked, we cannot evade it.

Again at page 33 of the Supplemental Record, the following colloquy took place:

THE COURT—Suppose you have arbitrarily arrested this man and are holding him arbitrarily, this Court must inquire into that. We are not passing upon the sufficiency of your showing, but we are inquiring into the necessity of the Government of making some showing to justify the arrest and detention of this man. Otherwise, we must discharge him.

MR. RICHEY—The government is willing to meet any showing of the defendant's right to be here, which he is affirmatively required to make.

THE COURT—The Court does not criticise counsel as to the position he takes—only this: there is one thing to do: either proceed as in any other case of habeas corpus by the presentation of proof, or any showing you may make, or to grant the writ upon the theory that the Government has failed to present anything justifying the detention of the prisoner. * * * (S. R. 34-35.)

THE COURT—The Government may do one thing: they may stand upon the question of custody of the defendant at the time this application was made. That is all right. The Court will pass upon that. If you do not stand upon that, then, of course, you will have to stand upon the other question as to whether the petition makes out a prima facie case showing unlawful detention—detention in the absence of any showing by the Government which would contravene the allegations of the petition. * * *

THE COURT—Well, I should like to have the matter thoroughly gone into. If there is any real cause for his arrest and detention, I should like to have an opportunity to pass upon it, but I am afraid under the return that there is nothing to go into

except the examination of the certificate. It seems to disclose prima facie his right to remain. That is enough to place the burden on the United States.

MR. RICHEY—If the Court please—if the Court hold that with the showing here we have to produce evidence the same as we would have to introduce, it puts the matter up in the same position that if at the time of trial the prisoner should go before the Commissioner and present his certificate, and we would produce our evidence if we had any. Now, if the Court is going to require—I mean if the Court is going to hold that he will discharge this prisoner if we do not controvert the claim he makes in the petition—

THE COURT—Of course, the Court does not say that—it says that I am afraid from the return as made here, there is no sufficient cause shown for his detention. * * *

THE COURT—This complaint only states a matter of conclusion of law. (S. R. 44.)

MR. RICHEY—Suppose we don't make a complaint—just take him before the Commissioner. That would be the same thing.

THE COURT—Yes. (S. R. 45.)

MR. RICHEY—Then we would be compelled to produce his certificate.

THE COURT—Suppose he has produced his certificate?

MR. RICHEY—Then the United States is compelled to produce its evidence.

THE COURT—When the certificate is exhibited, that establishes a prima facie right.

MR. RICHEY—Yes, your Honor, and I ask now whether your Honor is going to take cognizance of that certificate in this proceeding to such an extent as to compel an introduction of evidence if we desire to controvert this proceeding. If you produce this before the Commissioner, that is sufficient for the Commissioner to discharge him unless we show proper evidence to the contrary. * * *

THE COURT—It is for the counsel to say. It is, of course, improper for the Court to indicate what the counsel ought to do.

MR. RICHEY—I want to know what position the Court assumes, and then I will be able to know what we will be required to do.

THE COURT—The question before the Court, Mr. Richey, is not one of fact. It is one of law; whether the pleadings as are now presented—and by the pleadings I mean the petition filed by the petitioner for the writ, and the return as made by the Marshal—(page 46) show prima facie that this man is entitled to his discharge. They show that this man has a certificate, and there is no other reason given why that certificate should not be accorded the effect which certificates under the law are intended to be given. That is the right of a Chinaman to remain in this country. Whether this certificate is conclusive evidence or only prima facie evidence—is there any fact here set up by the Marshal in his return to show that he is unlawfully within this country, notwithstanding, his possession of this certificate, and I do not take it that there is.

MR. RICHEY—No, your Honor. We did not expect to give the names of our witnesses and what

they have to testify to. It is up to the Chinaman himself to affirmatively show, as my understanding * * *

THE COURT—To show what?

MR. RICHEY—To show his right—it is our contention that that matter will not be gone into if the answer meets the petition and shows the jurisdiction in the Commissioner.

THE COURT—I understand that your answer admits that he had this certificate.

MR. RICHEY—Yes.

THE COURT—That by your answer puts the burden on the Government.

MR. RICHEY—Before the Commissioner, yes; not here your Honor.

THE COURT—I don't understand that that makes any difference. (S. R. 47.)

MR. RICHEY—It makes all the difference. If the Commissioner has jurisdiction, your Honor will not go into the facts.

THE COURT—I want to give the Government a fair opportunity to present—is it your position, Mr. Richey, that the Government is not required here to put in any proof at this time or make any showing whatever as to the real cause of detention of this Chinaman?

MR. RICHEY—At this time, no, your Honor.

THE COURT—In this proceeding?

MR. RICHEY—No, your Honor; on this basis that your Honor is not entitled to go into any of the facts after your Honor has ascertained that the Commissioner before whom this proceeding was brought has jurisdiction in this matter—that your Honor will not go into the facts any further than the ascertainment of whether or not the Commissioner had jurisdiction. * * * (S. R. 48.)

THE COURT—But suppose it appear upon the showing that the arrest was merely arbitrary; that there was no cause for it—no reason for it. Would the Court then remand the case and not go into it? I do not understand that to be the law.

MR. RICHEY—No.

THE COURT—That is the position here—that is exactly the position here.

MR. RICHEY—We will be glad to show that it has not been arbitrary. We have witnesses here ready to go to trial *down there* this afternoon.

THE COURT—We must dispose of this inquiry, and care nothing about the other except as it bears upon the right of the Court to proceed with this investigation. Under the showing here, it does appear that this man was arbitrarily held and is arbitrarily held because he has a certificate valid upon its face and there are no facts to show that this certificate was invalid.

MR. RICHEY—There is no contention that it is invalid. We do not contend that it is invalid.

THE COURT—Is there any contention that this certificate be wrongfully in the possession of this de-

fendant? He has the right to use it so long as it has not been determined that he is unlawfully here.

MR. RICHEY—That might be a question as to what might be determined lawfully in possession.

THE COURT—On the face of this return, Mr. Richey,—we tried the issue raised by the return. Now, from the return—we are bound by the return—what may lie back of the return.

MR. RICHEY—The return of the writ denies that the defendant has any right to be in the United States.

THE COURT—That is a question of law—the purpose of the writ. Exhibit the facts, nothing more. Exhibit the facts, whatever they may be. If this man has forfeited his right and standing under this certificate, that fact can be disclosed and might be an issue to try. * * *

MR. KENT—I think Mr. Richey's position is that this Court has no right to try this case and it ought to be done before the Commissioner.

THE COURT—I think it resolves itself down to this proposition: it having appeared here that a warrant of arrest was issued under a complaint sworn to before the Commissioner, and that the defendant was arrested under this warrant, and that this ends this examination and further proceedings must terminate and the man may be remanded to await the result of that contention.

MR. RICHEY—That is my contention, your Honor. Unless this Court here will hold that this complaint is not a sufficient complaint—(S. R. 50).

THE COURT—If we take that extreme view—

say, ordinarily, that this is a case where the Court should exercise its discretion so as to permit these examinations to be held by the committing magistrate rather than by the Court by whom the writ is issued. Suppose we take that extreme view. If it should affirmatively appear here from the showing made that the detention was unlawful—that is to say that there was no warrant for the detention—it is only in those cases where a substantial question of fact is raised to be tried, and a finding of fact to be made by the Court, and where the Court would decline to proceed to make a finding of fact, that it would remand the case to the committing magistrate to make the finding. It is difficult for the Court to conceive upon what theory the Government wishes to proceed against this Chinaman in the face of that certificate. Upon the face of that certificate, it does look like an arbitrary arrest.

MR. RICHEY—The Government informed counsel for the defendant that the defendant went out of the United States and the—

THE COURT—The Court has not been advised as to that. * * *

THE COURT—I am not certain—in some cases I would say that, if it is a question of fact, and not a question of law—I would not remand a case upon a question of law, (S. R. 51) but upon a question of fact I am inclined to think I would. What question of fact is there in this return? None at all. This is not a question of fact—it is a question of law. Let me see the original petition. I think, Mr. Richey, if you will examine those cases, you will find that in every instance where the courts have remanded the cases, it was because of some issue of fact to be tried

and determined. I know of no instance where a court of superior jurisdiction has remanded a case to a court of inferior jurisdiction when the right of the defendant turns upon a question of law. * * *

THE COURT—I don't see any reason why the Court should remand the defendant upon the questions of law raised by this return.

MR. RICHEY—We have raised questions of fact in our answer. They say he has been here all the time. We deny—

THE COURT—That is an immaterial fact.

MR. RICHEY—That is part of the case—he was out of the country.

THE COURT—Do you affirmatively say that he has been out of the country?

MR. RICHEY—They affirmatively set up that he has been here, and we deny that he has been here. In substantiation of their claim, they produce a certificate, and we are ready to produce evidence to controvert it.

THE COURT—You say you are ready?

MR. RICHEY—Yes.

THE COURT—You say you are ready now to raise that?

MR. RICHEY—Yes.

THE COURT—Why not set it up?

MR. RICHEY—We thought we set it up—

MR. KENT—Your Honor, I think that every opportunity has been given. Mr. Richey's position has been explained several times; that this Court has no power to try this, but it should go back to the Commissioner. We are here now, your Honor, upon the sufficiency of this return. (S. R. 52.)

In the face of the three returns which had been made and of the lengthy discussions which had taken place between the Court and counsel, in which the prosecuting attorney constantly denied the Court's jurisdiction to hear evidence upon the merits, and in which he had repeatedly declined to *offer* the evidence which he said he had, we cannot regard the feeble assertion contained on page 52 of the Supplemental Record, that our learned opponent was "ready" to produce evidence to controvert the certificate of residence as a substitute for an offer of proof. He rested content with the mere expression of opinion that he thought he had set up facts controverting the certificate of residence, although he made no effort whatever to secure the further amendment of his return to enable him to prove such facts, if they existed.

In reality he meant what he had previously stated (S. R. 48). "We have witnesses *here* ready to go to the trial *down there* (meaning before the Commissioner) this afternoon."

However "ready" our opponent may have been, he never offered his alleged proof, and never stated its alleged substance. He could not have expected the Court

or opposing counsel to call his alleged witnesses and he failed to call them himself. Indeed, he had deliberately declined by his pleadings to raise the issue in support of which their evidence could have been received.

We deem a further discussion of this assignment unnecessary, except to point out that the alleged evidence to controvert the certificate of residence, even if it had been offered, would have been inadmissable under the return which failed to allege any such facts.

It is clear, moreover, that it would have constituted no offense for the accused to have been in Mexico, even for a period of several years, as stated in the fourth assignment, provided the provisions of the law relating to departure and return of persons of Chinese descent from and to this country had been complied with. There is no claim or assignment that the accused had been in Mexico and that he had been there without the authority prescribed by law and had surreptitiously returned without like permission, so that standing alone, the mere assertion of a presence in Mexico is an empty and meaningless charge.

Assignment 2, 5, 8 and 9 (R 39, 40) each raise and present squarely the issue of the jurisdiction of the court below to make the order appealed from. Assignments 3, 6, and 7, are wholly insufficient to present any question for review (C. C. A. Rules 24) because of the general and vague character of each, and if these assign-

ments serve any useful purpose it can only be as a further reiteration of the only error specifically assigned, namely, that the Court below had no jurisdiction to make the order appealed from. Thus assignment No. 3 is as follows:

> "The ruling of the court that the petitioner should have judgment on the pleadings and the granting of judgment and decree on the pleadings."

And Assignment No. 6

> "The finding of the court that the petitioner was unlawfully restrained."

And assignment No. 7

> "The final order and decree is contrary to law and to the pleadings and the facts."

So also the only facts alleged in the second amended return (R 21-31) are those claimed to support the contention of our opponent that the court below had no jurisdiction in the premises.

Appellant's brief shows that counsel's whole argument is based on a claim of lack of jurisdiction in the court below. Thus it appears that this is not only a case in which the jurisdiction of the court below is in issue, but one in which no other question is presented for review.

Therefore, in support of our motion to dismiss we confidently assert that this Court has no jurisdiction of this appeal.

Section 238 of the Judicial Code, which is a re-enact-

ment of the Act of March 3, 1891, C. 517, 26 Stat. 826 (U. S. Comp. St. 1901, p. 549) establishing the Circuit Courts of Appeals provides that

> Appeals and writs of error may be taken from the District Courts * * * direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from final sentences and decrees in prize causes: in any case that involves the Constitution or application of the Constitution of the United States: in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question, and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

Section 128 of the Judicial Code, which prescribes the appellate jurisdiction of the Circuit Courts of Appeals, provides:

> "The Circuit Courts of Appeals shall exercise appellate jurisdiction to review on appeal or writ of error, final decisions in the District Court * * * in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court as provided in Section 238, unless otherwise provided by law. * * *

We think the language of the Supreme Court in Spreckles Sugar Refining Co. vs. McClain, 192 U. S.

397, 407, is applicable to the case at bar, and settles the question raised in favor of the appellee. The Court said in part:

> "If the case as made by the plaintiff's statement, had involved no other question than the constitutional validity of the Act of 1898, or the construction or application of the Constitution of the United States this court alone would have had jurisdiction to review the judgment of the Circuit Court." Citing Huguley Mfg. Co. vs. Galetan Cotton Mills, 184 U. S. 290, 295.

In principal this authority is applicable to the case at bar.

That the authority relates to a ground of exclusive jurisdiction, other than that involved here, is not important.

The Judicial Code expressly limits this court's jurisdiction in cases *other than those in which appeals and writs of error may be taken to the Supreme Court as provided in Section* 238.

The case at bar is such a case.

> Craemer vs. Washington State, 168 U. S. 124, 127.
> Dimmick vs. Tompkins, 194 U. S. 540, 546.
> Chin Yow vs. U. S., 208 U. S. 8, 10.

Dissenting opinion by Circuit Judge Morrow, in Re Can Pon, 168 Fed. 485, 488, and in

St.Louis,etc,Co. v.Amer.Cotton Co.,125 Fed.196 C.C.A.8th Circuit, Circuit Judge Sanborn.

Halpin v. Amerman,138 Fed.548;C.C.A.2d Cir.(1905)

Olds vs. Kettler Lmbr. Co., 195 Fed. 9,11 C.C.A. 6th Cir. 1912.

Fed. 479, in that, in that case other questions than those of which the Supreme Court had exclusive jurisdiction by a direct appeal, were presented for review. These other questions drew to the appellate jurisdiction of this court all the questions presented by the record. Here the sole question which the record presents is one of which the Supreme Court has exclusive jurisdiction. There are no other questions in the case as made by the appellant's assignments which can draw to the jurisdiction of this Court a consideration of the questions which Congress has committed exclusively to the Supreme Court for determination.

Involving as it does the solitary question of the jurisdiction of the court below, the Supreme Court has exclusive jurisdiction and this Court has none. Judicial Code, Sec. 128, 238, and cases cited supra.

It follows therefore, that the appeal should be dismissed.

If our motion to dismiss be granted no further argument is needed in this Court to sustain the order of the court below, but if the motion be denied, we will be required to discuss the merits of the controversy not only for the purpose of showing that the court had jurisdiction to make the order appealed from, but to show that the order was right, and a proper exercise of judicial discretion. We therefore proceed to discuss the merits under the following postulates:

POINT I.

THE APPELLEE IS LAWFULLY WITHIN THE UNITED STATES.

The fact that the prisoner has a certificate of residence (R. 32) issued to him as a Chinese person other than a laborer under the Act of May 5, 1892, as amended by the Act of November 3, 1893, conferred upon him a certain status.

That status entitled him to be and remain in the United States until his certificate was revoked or until it was shown that he had forfeited his right to be here.

Lew Quen Wo vs. United States, 184 Fed. 685, 688.
Lee Ho How, 101 Fed. 115.
Re Tom Hon, 149 Fed. 842.

In Lew Quen Wo vs. United States, 184 Fed. 685-688, Circuit Judge Gilbert, referring to a certificate of identity issued to the appellant after the Commissioner of Immigration had passed upon his right to admission said:

> "It is not like the certificate of residence provided for in the Act of 1893, which defined the method by which Chinese in the United States might obtain evidence of their right to remain. Those certificates were registered as the solemn act of the government and were intended to furnish evidence of the right of the holder thereof to remain in the United States and to be conclusive evidence of that right and they are not subject to collateral attack. In re See Ho How (D. C.) 101 Fed. 115; In re Tom Hon (D. C.) 149

Fed. 842. The object of the exclusion acts, as Mr. Justice Field said In re Ah Sing (C. C.), 13 Fed. 286, was not to expel Chinese laborers already in the United States, but to prevent the further immigration of Chinese laborers."

In See Ho How, 101 Fed. 115-117, Judge DeHaven, in discharging a Chinese laborer who had been ordered deported, and in referring to a certificate issued to him under the Act of 1892, as amended, said:

"The right which the certificate confers is a valuable one, of which the holder can only be deprived by the judgment of a court of equity in a direct action brought by the United States for the purpose of annulling it, or in a proceeding for deportation, by proof that since its issuance the holder has forfeited his right to remain in the United States by departing therefrom without procuring from the Collector of Customs of the district from which he departed a certificate entitling him to re-enter the United States, as provided in Article 2 of the Treaty of March 17, 1894, between the United States and China, and the regulations adopted by the Treasury Department for the purpose of carrying out the provisions of that article. * * *. And upon precisely the same principle the judgment of deportation in this case must be held void in the extreme sense, and because it appears upon the face of the judgment that petitioner is in possession of an uncancelled certificate of residence, which, in the absence of a finding that he subsequently departed from the country and thereby forfeited the right conferred by such certificate, entitled him to remain in the United States."

But it is not every departure from the United States

that would operate as grounds for the forfeiture of such a certificate.

We respectfully contend that the status acquired by a merchant or Chinese person other than a laborer by domicile in the United States prior to the Act of 1892 and by registration thereunder, or under the act as amended in 1893, would not have been lost or rendered subject to forfeiture by a temporary departure from the United States.

Lau Ou Bew vs. U. S. 144 U. S. 47.
Ng Quong Ming, 135 Fed. 378-382.
U. S. vs. Wong Lung, 103 Fed. 794.
U. S. vs. Chin Fee, 94 Fed. 828.
Jew Sing vs. U. S. 97 Fed. 582.
Sprung vs. Morton, 182 Fed. 330-337.
Re. Buchebaum, 141 Fed. 221-223.

Nor do we understand that the case of Lem Moon Sing vs. United States, 158 U. S. 538, or anything contained in the case of the United States vs. Ju Toy 198 U. S. 253 affects the particular question now before this Court.

It has even been intimated, by way of dicta it is true, that even the departure of a laborer from the United States where the departure was only of a temporary or visitorial character is not necessarily such as to require his deportation.

U. S. vs. Trick Lee, 120 Fed. 989-991.
U. S. vs. Lee Yung, 63 Fed. 520.

In Sprung vs. Morton, 182 Fed. 330-337-339, District Judge Waddill (Eastern District of Virginia) said:

"It is equally well settled that aliens who have once lawfully acquired a residence in this country do not lose the same or become liable to deportation under the immigration laws by temporarily leaving the country and re-entering. The authorities to maintain the general proposition are numerous and might be cited almost without number. * * * (citing some of the foregoing cases). Having been once lawfully admitted she no longer occupies the status of an alien woman seeking admission, but is a resident within the conutry and as such entitled to all of the rights, privileges and benefits properly appertaining and accruing to her under the guaranties of the constitution and the laws of the land." (Citing many cases.)

Again In re Buchebaum (D. C.), 141 Fed. 222, Judge McPherson said:

"After an alien has once become a resident he is entitled to the same liberty of movement enjoyed by residents and citizens alike, and until he abandons his residence he is no longer amenable to the excluding provisions of the immigration law. That law is intended to operate when the immigrant presents himself for the first time, but after he has passed the scrutiny of the inspectors and has been admitted he is then entitled to the rights and privileges of residents in the United States as long as he continues to be a member of this class."

See also U. S. vs. Nakashima (9th C. C. A.) 160 Fed. 842, 844, and cases there cited.

The record in this case does not justify the discussion or presentation of the claim that the status of the accused has changed since the issue of his certificate and that he is now a laborer and as such subject to deportation. Such a contention is in reality an attempt to impeach collaterally the recitations in the certificate which as we have seen cannot be permitted. While it is true that it appears from the petition that due to financial reverses the accused is temporarily engaged in culinary and domestic pursuits, it has been frequently held that a mere temporary engagement in manual occupations does not effect a change of status which renders such a Chinese person liable to reportation as a laborer.

Re Chin Ark Wing, 115 Fed. 412.
U. S. vs. Foo Duck (Hunt J.) 163 Fed. 440; affirmed 9th C.C.A., 172 Fed. 856 (By Morrow J.)
U. S. vs. Louie Juen, 128 Fed. 522.
U. S. vs. Sing Lee, 71 Fed. 680.
In re Yew Bing Hi, 128 Fed. 319.
U. S. vs. Seid Bow, 139 Fed. 56.
U. S. vs. Leo Won Tong, 132 Fed. 190.
Ow Yow Dean vs. U. S., 145 Fed. 801-803.
U. S. vs. Yee Quong Yuen, 191 Fed. 28.

The existence of the certificate was alleged and admitted by the pleadings. This cast the burden upon the Government to allege and prove a forfeiture of the status thus created.

In U. S. vs. Wong Och Hong, 179 Fed. 1004, the defendant in a deportation case produced a certificate,

identified himself and rested,—In discharging the prisoner Judge Wolverton said: "Unless this case is overcome by the Government it logically follows that he should not be deported."

It follows, therefore, that the accused is lawfully within the United States and has a right to remain.

POINT II.

THE COURT BELOW HAD JURISDICTION TO GRANT THE WRIT AND TO ENTERTAIN THE PROCEEDINGS.

The jurisdiction of the court below to grant the writ and entertain the proceedings thereunder depended (1) upon the petitioner being in custody and actually restrained of his liberty when application for the writ was made and when it was directed to issue; and (2) in a prima facie showing that the detention of the accused was unlawful.

(1) It appeared that the accused was in the actual custody of the marshal at the time he applied for and was granted the writ.

The Court found the facts involved in this controversy in favor of the accused. While we do not claim for this finding any conclusive effect (Wong Hung vs. Elliott, 179 Fed. 110;) especially, when in reality there was no disputed issue of fact, still the conclusion of the learned court below is entitled to weight and consideration.

It was moreover correct. It really involved the decision of the question of law presented by the Government's contention that in the absence of a compliance with Sec. 1018 of the U. S. R. S. there could be no lawful surrender to the marshal. Section 1018 is as follows:

Sec. 1018 U. S. R. S. (Surrender of criminals by their Bail.)

> Any party charged with a criminal offense and admitted to bail, may in vacation, be arrested by his bail, and delivered to the marshal of his deputy, before any judge or other officer having power to commit for such offense, and at the request of such bail, the Judge or other officer shall recommit the party so arrested to the custody of the marshal, and endorse on the recognizance, or certified copy thereof, the discharge and exonerature of such bail and the party so committed shall therefrom be held in custody until discharged by due course of law.

The Government's contention in this respect is conclusively answered by the authorities which hold that proceedings for the deportation of a Chinese person are civil and not criminal proceedings.

U. S. vs. Hung Chang, 134 Fed. 19.
U. S. vs. Mong You, 126 Fed. 226.
Woo Jew Dip vs. U. S. 192 Fed. 471.
Chin Wah vs. Colwell, 187 Fed. 592.
Re Lam Jung Sing, 150 Fed. 608.
Loo Foon Yim vs. U. S. Imm. Com. (9th C. C. A.) 145 Fed. 791.
Fong Yue Ting vs. U. S. 149 U. S. 698,730.
Ex parte Tom Tong, 108 U. S. 556.

One surrendered by his bondsmen is sufficiently in custody to warrant a discharge in a proper case on habeas corpus.

> Ex parte Buford, 1 Cranch C. C. 456; 4 Fed. cases No. 2149.

Hence, there is nothing in the contention that because the accused failed to observe a statute which related to criminal and not to civil proceedings he was not in custody, or that the court was without jurisdiction to issue the writ of habeas corpus for this reason.

But assuming, without conceding, that at the time the writ issued the prisoner was still on bail, we nevertheless contend that the admission of the prisoner to bail did not relieve him from custody under the process by which he was apprehended and detained.

His prison walls had simply been enlarged so that temporarily they surrounded the limits of the District of Arizona.

It cannot be said that a person who cannot leave a definite territory is not restrained of his liberty. The accused was still in theory of law in the possession of the marshal.

> "When bail is given, the principal is regarded as delivered into the custody of his sureties. Their dominion is a continuance of the original imprisonment." (Taylor vs. Taintor, 16 Wall. 371.)

The rule that a person admitted to bail is potentially

in custody, and so remains until discharged from imprisonment, is as old as the common law. Bacon's Abridgment says: "His bondsmen are his gaolers of his own choosing." In Anon's case (6 Mod., 231,) it is said: "The bail have their prisoner on a string, and they may pull the string whenever they please and render him in their own discharge."

The principle is established by many authorities:

Cosgrove vs. Winney, 174 U. S. 68;
In re Grice, 79 Fed. 633.
U. S. vs. Stevens, 16 Fed. 105.
Turner vs. Wilson, 49 Ind. 581.
Divine vs. State, 5 Sneed, 625.
Levy vs. Arnsthall, 10 Grat. (Va.) 641.
Ex parte Gibbons, 1 Atk., 238.
Spear on Extradition, p. 445.
Petersdorf on Bail, pp 91, 406.

Nor did the mere fact that a judicial proceeding or inquiry was already pending in which the ultimate right of the accused to liberty would be determined, deprive the district court of the power and jurisdiction to grant the writ and inquire into the cause of his detention.

Ex parte Royall, 117 U. S. 241.
Boske vs. Commingore, 177 U. S. 459-466.
Minnesota vs. Brundage, 180 U. S. 499-501.
Reid vs. Jones, 187 U. S. 154.
Davis vs. Burke, 179 U. S. 399-402.
Ex parte Glenn, 111 Fed. 257-260-261.
U. S. vs. Fuellhart, 106 Fed. 914.
Anderson vs. Elliott, 101 Fed. 609-613-615.

Re Turner, 119 Fed. 231, 233.
Whitten vs. Tomlinson, 160 U. S. 231.
State of New York vs. Eno, 155 U. S. 89.
Baker vs. Grice, 169 U. S. 284-290.
Fitts vs. McGhee, 172 U. S. 516, 533.

While in some of the cases cited the Court declined to issue the writ of habeas corpus, or, after the writ had been issued declined to discharge the prisoner thereunder, all of the cases recognize the jurisdiction and power of the court to grant the writ and inquire into the cause of detention. And this is so even though there be then pending some other proceeding in which the ultimate rights of the petitioner for the writ, might be ascertained and determined.

That this inquiry should, in the vast majority of cases in which issues of fact are presented, be confined to an inquiry into and not the determination of the controversy, is readily conceded, but where the inquiry which is instituted solely for the purpose of ascertaining whether jurisdiction to arrest and detain the accused exists and that such jurisdiction is not being oppressively or unfairly exercised, results in a determination as a matter of law that there was no power to continue to confine the accused upon the showing made, and as a matter of fact that process valid in the first instance was being oppressively used, then the Court not only has the power to intervene, but should exercise its judicial discretion by immediate intervention.

The Revised Statutes of the United States contemplated no such restriction upon the powers of the courts and imposed none. (U. S. R. S. 751, et. seq.)

Section 753 of the U. S. R. S. expressly authorized the writ to issue when the accused "is committed for trial before some court" of the United States, which shows that congress never intended so to curtail the powers of the district and circuit courts of the United States, that they would have no jurisdiction or right even to inquire into the cause of an unjust detention simply because of the pendency before some officer or tribunal of a proceeding in which the ultimate rights of the accused might be determined.

Nor did the Chinese exclusion acts impair the power and jurisdiction of the district courts and judges thereof in habeas corpus cases.

U. S. vs. Chung Shee, 71 Fed. 277, 281.
U. S. vs. Ah Lung, 124 U. S. 621.

(2) As already shown the petitioner had a certificate of residence and this established his right to be and remain in the United States. He was apprehended and detained upon process which failed to disclose any grounds for the forfeiture of such certificate.

This being the condition of the record it necessarily followed that the prisoner was unlawfully restrained of his liberty, which facts established his right to a discharge on habeas corpus.

POINT III.

THE COURT BELOW PROPERLY EXERCISED ITS JUDICIAL DISCRETION IN DISCHARGING THE PRISONER.

Since it is clearly established that the Court had jurisdiction to grant the writ and to discharge the prisoner upon the showing made, the real question to be determined by this Court upon the merits is, did the court below abuse or improperly exercise the judicial discretion vested in it.

If there was a mere erroneous exercise of discretion as distinguished from an abuse of discretion, or palpable or gross error, this Court will not revise the order of the court below for such a cause, "unless the evidence in the record is such as to convince an appellate court that it was erroneous."

In re Can Pon, 168 Fed. 479, 484.
U. S. vs. Ronan, 33 Fed. 117, 119, 120.
Wong Heung vs. Elliott, 179 Fed. 110.

But we respectfully contend that the record and the order appealed from not only fail to show any abuse of discretion but that the order is right and the only order which the court below could lawfully have made upon the record before it.

The record before the Court presented no question of fact for determination.

The prosecution presented only the question of the

District Court's jurisdiction even to inquire into the cause of detention, and refused to disclose the real charge against the prisoner.

Undoubtedly the return showed that the Commissioner had a general jurisdiction over the charge that the prisoner was illegally here, but it failed utterly to disclose the existence of a particular jurisdiction to adjudge the presence of the accused in this country to be illegal in contradiction of an unrevoked certificate of residence. It could not have disclosed such a particular jurisdiction because there was no claim or assertion that the prisoner had done anything to forfeit his right to his certificate.

The existence of the general jurisdiction had been superceded by the admitted fact that the prisoner had a certificate, and until he was charged with having forfeited his rights so evidenced, no court or commissioner had jurisdiction of any kind to arrest and detain him.

We are aware that following the decision of the Supreme Court of the United States in Ex parte Royall, 117 U. S. 241, the courts have in many instances followed and extended the doctrine there announced.

The doctrine in question in the words of Mr. Justice Harlan (p. 251) is as follows:

> "We are of the opinion that while the circuit court had the power to do so and may discharge the accused in advance of his trial if he is restrained of his liberty in violation of the National Constitution, it

is not bound in every case to exercise such a power immediately upon application being made for the writ. * * * The injunction to hear the case summarily and thereupon 'to dispose of the party as law and justice require' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing under our system of government between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.

"When the petitioner is in custody by state authority for an act done or omitted to be done in pursuance of a law of the United States or of an order, process or decree of a court or judge thereof, or where being a subject or citizen of a foreign state and domiciled therein he is in custody under like authority for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission or order or sanction of any foreign state or under color thereof, the validity and effect whereof depend upon the law of nations, in such and like cases of urgency involving the authority and operations of the general government, the obligations of this country to or its relations with foreign nations, the courts of the United States have frequently interposed by writs of habeas corpus and discharged prisoners who were held in custody under state authority."

We respectfully submit that wholesome as this doctrine is when applied to the class of cases to which it

was intended to be applied, the doctrine is wholly inapplicable to the case at bar.

The reasons which prompted its pronouncement are stated by Mr. Justice Harlan to have been to avoid a conflict between federal and state authority.

No such reason can exist for applying it in cases such as the case at bar. There is not and never has been danger of a conflict of jurisdiction between the district court and its creature, a United States Commissioner.

But where one is unlawfully detained upon federal process where the right of detention as disclosed by the habeas corpus proceedings depends only upon an issue of law and not of fact, which issue is fundamental in its nature and is not one merely of form, a prisoner is, in the discretion of the court, entitled to be discharged on habeas corpus.

Indeed in practically all classes of cases and at any stage of the proceedings where a person in custody claims to have and to be entitled to a *status* which exempts him from the arrest and detention to which he is subjected, that claim, in the exercise of the court's discretion, especially if it depends upon a question of law, is the proper subject of inquiry and determination in habeas corpus proceedings. "The fact that the court can inquire by habeas corpus into the question of whether a person is within the class amenable to a

particlular jurisdiction has frequently been the subject of review by the courts and would seem to be no longer open to controversy."

Sprung vs. Morton, 182 Fed. 330-334.
Hopkins vs. Fachant (9th C. C. A.), 130 Fed. 839.
Rodgers vs. U. S., 152 Fed. 346.
U. S. vs. Nakashima, 160 Fed. 842. (9th C. C. A.)

And in U. S. vs. Sing Tuck, 194 U. S. 161-168, Mr. Justice Holmes in announcing the familiar rule that a prisoner should generally exhaust his remedies before the officers or tribunal charged with the duty to determine the facts relative to the matter involved, in explanation of Gonzales vs. Williams, said:

> "In Gonzales vs. Williams, 192 U. S. 1, there was no use in delaying the issue of the writ until an appeal had been taken because in that case there was no dispute about the facts but merely a question of law."

In New York vs. Eno, 155 U. S. 89, 99, Mr. Justice Field in a dissenting opinion in which Mr. Justice Shiras concurred, recognized the same principle, and said,

> "It would therefore subserve no useful purpose to proceed with the case in the state court, and thus ascertain what that court might have done or would have done had it possessed jurisdiction. * * * He was therefore entitled to his discharge whenever the matter was properly brought to the attention of the Federal Court."

Judge Whitson in ex Parte Koener, 176 Fed. 478, 479, expressed the same principle as follows:

"While the courts are bound by findings duly made by the executive branch in matters of this kind (U. S. vs. Ju Toy, 198 U. S. 253; Pearson vs. Williams, 202 U. S. 281; Ocean Navigation Co. vs. Stranahan, 214 U. S. 321) they cannot properly refuse relief where, upon admitted facts, it appears as a matter of law that the person sought to be deported is not within the inhibition of the statute" citing Gonzales vs. Williams, 192 U. S. 1 Ex Parte Watchorn, 160 Fed. 1014.

And Circuit Judge Morrow recognized the principle in Lavin vs. La Fevre, 125 Fed. 693-696, where in holding that the executive officers of the government have exclusive jurisdiction to determine the right of an alien immigrant to land and come into the United States, he said:

"But whether in deporting an alien immigrant they are proceeding according to law, is a judicial question and may be inquired into by the court upon writ of habeas corpus."

The principle under discussion is exemplified in a great variety of cases and proceedings:

(1) It is a matter of common occurrence in deportation proceedings under the exclusion act.

Re Fong Yue Ting vs. U. S. 149 U. S. 698.
Ex parte Koener, 176 Fed. 478.
Ex parte Petterson, 166 Fed. 536, 539.
Ex parte Watchorn, 160 Fed. 1014, 1016.

(2) And in proceedings under the immigration acts.

Sprung vs. Morton, 182 Fed. 330.
Gonzales vs. Williams, 192 U. S. 1.
U. S. vs. Wong Kim Ark, 169 U. S. 649.
U. S. vs. Tee Quong Yuen, 191 Fed. 28.
U. S. vs. Jung Ah Lung, 124 U. S. 621, 626.
Wan Shing vs. U. S., 140 U. S. 424.
Lau Ow Bew, Pet., 141 U. S. 583.

(3) So also in Federal removal proceedings under Section 1014 of the Federal Revised Statutes.

In re Beavers, 125 Fed. 988.
In re Beavers, 131 Fed. 366.
In re Greene, 52 Fed. 104, 106.

(4) And in extradition proceedings the same practice obtains.

Wright vs. Henkel, 190 U. S. 40, 57.
Terlindin vs. Ames, 184 U. S. 270, 280.

(5) And interstate rendition cases present similar examples of the same principles.

Nichols vs. Pease, 207 U. S. 100, 108.
Robb vs. Connelly, 111 U. S. 624.
Ex parte Morgan, 20 Fed. 298, 302.
Hyatt vs. Cockran, 188 U. S. 691.
Pettibone vs. Nichols, 203 U. S. 192.

(6) So also in cases of courts martial, where only a question of law is involved.

Ex parte Mulligan, 4 Wall. 2.
Hamilton vs. McCloughry, 136 Fed. 445, 447, 448.

And where, as in this case, it appears and the district

judge is satisfied that the deportation proceedings are being conducted in an arbitrary and unfair manner, even the very courts which most strictly follow the policy of allowing administrative officers the greatest latitude in the exercise of judicial functions formerly committed exclusively to our courts, recognize the plain duty of the district court to intervene by its writ of habeas corpus.

Chin Yow vs. U. S. 208 U. S., 8.
Tang Tun vs. Edsell, 223 U. S. 673.
Prentis vs. DeGiacomo 192 Fed. 467, 469.
Prentis vs. Sen Teung, 203 Fed. 25.
Edsell vs. D. Charley Mark, 179 Fed. 292.

The record in the case at bar shows a persistent refusal on the part of the prosecuting officers to disclose the real charge against the prisoner, a situation which violated the few rights still accorded one subject to deportation, for, while deportation proceedings are civil and not criminal in nature as we have seen, nevertheless the accused is entitled at least to a hearing in good faith, though not to a judicial trial, and the officers conducting the examination "must take the testimony pertinent to the questions involved of such witnesses as may be suggested by the applicant."

Re Can Pon 168 Fed. 479, 483; 9th C. C. A.

Indeed it has even been held that a Chinese person in a deportation proceeding is entitled to take depositions de bene esse, under United States Revised Statutes, Sec. 863.

Re Lam Jong Sing, 150 Fed. 608, 609.

Surely a deportation proceeding has become a travesty if a prosecuting officer may admit, as he must in view of the authorities, that a prisoner is entitled to the testimony of such witnesses as he may suggest, and even that he is entitled to take their testimony by deposition when desired, but that all knowledge or information concerning the charge may be suppressed and withheld from the prisoner so that it is impossible for him to know what witnesses he may desire to call or what issue he may wish to refute or establish.

It is idle to say that he was informed by the statement that he was "unlawfully here". This charge might have embraced a variety of wholly different acts or omissions, any one of which may have been committed or omitted at any time during a period of residence long prior to 1892.

Such proceedings come within the class of unfair prosecutions which have uniformly been held to require the court to exercise its discretion by issuing its writ of habeas corpus, and, where necessary, by discharging the prisoner.

Chin Yow vs. U. S., 208 U. S. 8.
Re Can Pon, 168 Fed. 479.
Re Monaco, 86 Fed. 117.
Rodgers vs. U. S., 152 Fed. 346.
U. S. vs. Nakashima, 160 Fed. 842.

The court below repeatedly described the proceedings

against the accused as arbitrary in their nature, and we respectfully submit that where the certificate of residence of the accused is seized and taken from him, which seizure results in substantial embarrassment in the preparation of the defense of the accused, and where after a period of many years residence in the United States the only charge against the accused is that he is 'unlawfully' here, in the face of his certificate, which stands uncancelled and unrevoked, presents no issue which any court has jurisdiction to try, or, at least, renders the proceedings unfair and oppressive in failing to accord to the accused an opportunity properly to defend himself, which in reality means a denial of due process.

The order discharging the accused was justified upon this ground alone.

But assuming that the doctrine announced in ex parte Royall and other analogous cases is applicable to the case at bar, nevertheless we say that circumstances of an urgent character existed, which not only justified, but required the court to issue the writ in the first instance and to inquire into the cause of the prisoner's detention and to discharge him from custody. In the first place the matter involved the right of a subject of a foreign nation with whom we enjoy treaty relations to remain in our country. While it affected individually the rights of a person in humble circumstances and in a lowly walk of life, it was one of the very class of cases excepted by

Mr. Justice Harlan from the operation of the doctrine announced in ex Parte Royall. Mr. Justice Harlan said:

> "In such and like cases of urgency involving the authority and operations of the general government or the obligations of this country to or its relations with foreign nations, the courts of the United States have frequently interposed by writs of habeas corpus and discharged prisoners who were held in custody under state authority."

A fortiori a Federal Court should so interpose in such a case when the prisoner is held under Federal process. No one can read the learned dissenting opinions of Mr. Justice Brewer in the case of Ju Toy vs. U. S., 198 U. S. 253 and in Lem Moon Sing vs. U. S., 158 U. S. 538, and in other cases and fail to realize the importance of the subject even in its application to the humblest subject of any foreign nation.

Moreover, the writ was returnable on March 3, 1913. This was the last day upon which the district judge had power to sit in the district of Arizona.

The recess appointment under which the learned judge acted expired on the following day. It was well known that many months would elapse before a district judge would be appointed and could qualify in the district of Arizona. In fact, such a judge did not qualify in the district of Arizona until August 26, 1913. Meanwhile had the matter proceeded before the Commissioner, and the

proceeding had resulted adversely to the accused, he could not have obtained bail pending appeal from such adverse decision, and although he might have been entitled to a discharge he would have been deported before he could have secured relief.

Although an appeal could have been prosecuted from an adverse order of the Commissioner in the absence of a District Judge the appeal would not have stayed the execution of the order and he would have been deported unless an order from the district judge was secured.

U. S. v. Loy Too, 147 Fed. 750. Affirmed.
Toy Gaup v. U. S., 152 Fed. 1022.

We respectfully submit that these circumstances, coupled with the judge's conclusion that the deportation proceedings were in reality purely arbitrary and were being oppressively conducted, were amply sufficient to justify the exercise of the court's discretion in granting the writ and discharging the prisoner.

Finally, upon the pleadings the court could only have ruled as it did.

The return set up nothing but conclusions of law and denials of legal conclusions and immaterial averments contained in the petition. Such a return is insufficient and entitled the prisoner to his discharge.

Strelton v. Shaheen, 176 Fed. 735.
Re Doo Woon, 18 Fed. 898, 899.
Hamilton v. McClaughry, 136 Fed. 445, 447, 448.

As was said in Re Moyer, 85 Pac. 190, page 192:

"It is urged by counsel for petitioner that certain averments in the petition for the writ are not controverted by the return. The latter is not treated as an answer to the application, but rather as a response to the writ itself. The averments of the petition are made for the purpose of obtaining the writ, and the respondent, in his answer thereto, simply seeks to relieve himself from the imputation of having imprisoned petitioner without lawful authority, and this he does, or, rather, is required to do, under the law by statements in the return from which the legality of the imprisonment is to be determined, without regard to the statements of the petition for the writ. In short, he is not required to make any issue on the petition for the writ, but to answer the writ. In re Chipchase, 56 Kan. 357, 43 Pac. 264; ex parte Durbin (Mo. Sup.) 14 S. W. 821; Simmons v. Georgia Iron & Coal Co. (Ga.) 43 S. E. 780, 61 L. R. A. 739."

But the appellant contends that the court exceeded its authority in adjudging the accused to be lawfully within the United States and in determining his right to remain here.

This issue was presented to the court, and, as we have seen, there was nothing to indicate anything to the contrary. The question could have been litigated by the Government had it seen fit to do so.

That the Government declined to do so is of no legal consequence to the accused and should be of no consequence to the court.

The accused was entitled to his adjudication just as the parties to any judicial proceeding are entitled to a determination of the issues before the court. The fact that the adjudication which he secured would bar subsequent proceedings involving the same charge is a substantial right of which the accused should not be deprived.

In Re Neagle 135 U. S. I.
U. S. vs. Chun Shee, 71 Fed. 277; Affd. 9th C. C. A. 76 Fed. 951.
Leung Jun v. U. S., 171 Fed. 413.

If the prosecution had witnesses such as are described in the fourth assignment of error, we respectfully submit that the only error committed in the proceedings in the court below was committed by our learned opponent and not by the court in failing to call such witnesses, and that this error is not ground for reversal.

In view of the foregoing discussion, we see nothing in the brief of our learned opponent which requires specific attention except to point out that some of the cases cited have no application to the matters in controversy.

Thus the case of U. S. vs. Stevens, 16 Fed. 101, cited to support the claim that the common law rule of surrender was identical with that prescribed by Section 1018 was a criminal and not a civil case and is therefore not applicable here.

So also it is unnecessary to burden the court with a specific analysis of every case cited.

Cases in which the court has declined to take from a subordinate court or officer the decision of issues of fact, or which announce the familiar principle that a writ of habeas corpus may not be used to perform the functions of a writ of error or an appeal, require no comment.

We believe that every case cited falls within one of these classes or within the principal of Ex parte Royall —which we have already fully discussed, and we believe are readily distinguishable from the case at bar.

We therefore respectfully submit that the record before the court shows that the accused was lawfully in the United States at the time of his apprehension and detention. The court below had jurisdiction to inquire into that detention and for the reasons stated, exercised its discretion properly in discharging the prisoner.

We, therefore, ask that the order of the court below be affirmed.

Respectfully submitted,
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San Francisco, October 8, 1913.
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